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A TREATISE

ON THE

STATUTES OF ELIZABETH

AGAINST FRAUDULENT CONVEYANCES:

THE BILLS OF SALE ACTS, 1878 AND 1882;

AND THE LAWS OF

VOLUNTARY DISPOSITIONS OF PROPERTY;

WITH

An Appendix

CONTAINING THE ABOVE ACTS AND

SOME UNPUBLISHED CASES (1700–1733) *FROM THE COXE AND MELMOTH MS REPORTS.*

BY THE LATE H. W. MAY, B.A.

From the Second English Edition.

BY S. W. WORTHINGTON, M.A.

OF CHRIST CHURCH, OXFORD, AND THE INNER TEMPLE, BARRISTER-AT-LAW;
EDITOR OF THE FIFTH EDITION OF GRIFFITH'S "MARRIED WOMEN'S PROPERTY ACTS."

PHILADELPHIA:
THE BLACKSTONE PUBLISHING COMPANY.
1887.

Entered according to the Act of Congress, in the year 1887, by the BLACKSTONE PUBLISHING COMPANY, in the office of the Librarian of Congress, at Washington, D. C.

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PREFACE TO THE SECOND EDITION.

Since the First Edition of this book was published, there have been great changes in the law relating to its subject-matter.

The law relating to bills of sale has—in consequence of the Bills of Sale Acts, 1878 and 1882, and of very numerous and important decisions upon these two statutes—undergone great alteration.

The Married Women's Property Act, 1882, has expressly enacted that settlements by a married woman shall be void against her creditors in cases in which similar settlements by a man would be so void. It has also enabled a married woman to acquire and to confer any property by gift or contract; and, by giving her, as her separate property, property in which, but for that Act, her husband would have had an interest, will probably have the effect of making settlements by her voluntary which otherwise might have been deemed for value.

The Bankruptcy Act, 1883, has also to some extent modified the law as to voluntary settlements.

There have been many decisions of importance on the Statutes of Iizabeth, such as *Crossley* v. *Elworthy*, *Mackay* v. *Douglas*, *Ex parte Mercer*, *In re Ridler*, *Price* v. *Jenkins*, *Lee* v. *Mathews* (in Ireland), *In re Foster and Lister*, and *Mackie* v. *Herbertson*, which have materially altered or modified the law on the different points they dealt with.

A large number of cases have been decided upon the complicated subject of voluntary dispositions of property unaffected by the Statutes of Elizabeth.

No pains have been spared to make the revision of this book as perfect as possible, and to include every case which may appear to bear upon its subject-matter, so as to make it a complete and trustworthy book upon the subjects of which it treats.

A considerable portion of the book has been entirely re-written, as, for instance, the chapters on the Bills of Sale Acts, 1878 and 1882, on consideration between husband and wife, and on ex post facto consideration; and the more important parts of chapters iv. and v., part iv., being the chapters on the nature and extent of the consideration of marriage and on post-nuptial settlements and ante-nuptial agreements. The whole of that part of the book which treats of voluntary dispositions of property unaffected by the Statutes of Elizabeth has been practically re-written and very greatly enlarged.

Frequent reference has been made to the decisions of the Irish and American Courts, and in some cases reference has been made to the divisions of the Upper Canadian Courts. The Statutes of Elizabeth, or statutes which correspond to them, are in force in these countries, and it is therefore hoped that the consideration of some of these decisions may help to the solution of many points which are still doubtful, or in which the English law appears unsettled.

A full Table of Cases has been prefixed, with references to all the contemporary Reports, and a Table of Statutes Cited has been added. In the Appendix the two Statutes of Elizabeth against creditors and purchasers have been set out in full, as also the Bills of Sale Acts, 1878 and 1882, for convenience of reference. A new Index has been carefully prepared, which it is hoped will render this book practically useful. The cases have been brought down to the beginning of October, 1886.

S. W. WORTHINGTON,

5 STONE BUILDINGS, LINCOLN'S INN,
December, 1886.

PREFACE TO FIRST EDITION.

To an eminent member of the Equity bar, whose pupil he was, the writer is gratefully indebted for the selection of the subject discussed in these pages. It is one on which, although it has been incidentally touched upon by several writers of great repute and authority, no exhaustive treatise has appeared for more than seventy years. This fact, added to the importance and general interest of the subject, while shewing that such a work is really wanted, and therefore making apology less necessary, at the same time increases the diffidence honestly felt in submitting the present work to the profession.

The writer cannot help expressing his surprise that the labours of some far abler pen than his own have not been attracted by a subject so full of interest.

The law on the construction of the Statutes of Elizabeth, as it now stands, is the result of more than three hundred years of judicial exposition and decision. By working almost entirely from the reports of decided cases, the writer has aimed at attaining originality, and, by taking every precaution to insure correctness and completeness, has done all in his power to produce a work of some value, as a convenient and trustworthy book of reference.

Wherever practicable the opinions of the judges have been given in their own words, and no pains have been spared to make the book as concise and practical as possible without doing so at the expense of perspicuity, or by the omission of any important points.

The writer can only throw himself on the indulgence of the learned members of the profession, in the hope that the honest and diligent endeavour to elucidate a subject by no means free from doubts and difficulties, may be allowed to weigh in the scale against faults and shortcomings which he fears will be found to exist in the execution of his undertaking.

3 Old Square, Lincoln's Inn,
January, 1871.

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THE LAW

OF

Voluntary and Fraudulent Dispositions of Property

UNDER

THE STATUTES OF ELIZABETH.

PART I.

THE GENERAL OPERATION OF THE STATUTES OF ELIZABETH AGAINST FRAUDULENT CONVEYANCES AND THE GENERAL DISTINCTIONS BETWEEN THEM.

THE statutes of Elizabeth now in force against fraudulent conveyances are the 13 Eliz. c. 5 (*a*), and the 27 Eliz. c. 4 (*b*).

13 Eliz. c. 5, protects creditors.

The statute 13 Eliz. c. 5, is made for the protection of creditors. It declares all conveyances and dispositions of property, *real or personal*, made with the intention of defrauding creditors, to be null and void against them.

(*a*) See Appendix No. I., where it is given in full. The statute was confirmed by 14 Eliz. c. 11, s. 10; made perpetual by 29 Eliz. c. 5, ss. 1, 2. Sections 5 and 7 are repealed by 26 & 27 Vict. c. 125. Other statutes had been previously passed on the same subject—viz., 50 Edw. 3, c. 6, 3 Hen. 7, c. 4, against fraudulent gifts of goods and chattels. By Manx statute, "all fraudulent assignments or transfers of the debtor's *goods or effects* shall be void and of no effect against his just creditors." Mills' Statute Law of Isle of Man, p. 238. *Corlett* v. *Radcliffe*, 14 Moore, P. C. 121, 132.

(*b*) See Appendix No. II., where it is given in full. This statute was made perpetual by 39 Eliz. c. 18, s. 32; from section 7 to the end of the Act is repealed by 26 & 27 Vict. c. 125.

27 Eliz. c. 4, protects purchasers.

The statute 27 Eliz. c. 4, is made for the protection of purchasers. It makes void, as against subsequent purchasers of the same *lands, tenements, or* [* 2] *other hereditaments*, all conveyances, * &c., made with the intention of defeating them, or containing a power of revocation.

Conveyances on good consideration and bonâ fide are excepted.

There is in each statute a proviso that nothing therein contained shall extend to defeat any estate or interest made on *good consideration and bonâ fide* to any person not having at the time any notice of such fraud (*c*).

What property 13 Eliz. c. 5, applies to.

The statute 13 Eliz. c. 5, applies to *all* kinds of property, real or personal; but it does not enlarge the remedies of creditors, or subject any property to execution which is not already in law or in equity subject to the rights of creditors (*d*).

What property 27 Eliz. c. 4, applies to.

The statute 27 Eliz. c. 4, applies only to real property and chattels real; it does not include personal property (*e*.)

Re-enacted in Ireland;

By the Irish statute 10 Car. I, sess. 2, c. 3, both these statutes are re-enacted for Ireland.

New York.

They have also been substantially re-enacted in New York (*f*), with some additional provisions and increased checks upon fraud. The most material provision is as to conveyances intended to defraud purchasers. It provides that "No such conveyance or charge shall be deemed fraudulent in favour of a subsequent purchaser who shall have actual or legal notice thereof at the time of his purchase, unless it shall appear that the grantee in such conveyance, or person to be benefited by such charge, was privy to the fraud intended" (*g*).

Statutes apply in America,

The statute 13 Eliz. c. 5, is in force in Maine, New Hampshire, Massachussetts, Delaware, Pennsylvania, Maryland, South Carolina, and Iowa. The various statutes in the other States are modelled after it, and in the main are simply a re-enactment of it (*h*).

(*c*) 13 Eliz. c. 5, s. 6; 27 Eliz. c. 4, s. 4.

(*d*) Story, Eq. Jur. 12th ed. ss. 367, 368; Kent, Com. 12th ed. vol. 2, 443; post, pp. 17, 18, 21.

(*e*) Post, pp. 202 *ei seq.*

(*f*) New York Revised Statutes, part 2, ch. 7, tits. 1–3, vol. ii. pp. 68, 72.

(*g*) See post, p. 196.

(*h*) Bump. Fr. Conv. (Amer.), 2nd ed. 10; Story, Eq. Jur. 12th ed. s. 253.

The statute 27 Eliz. c. 4, has been adopted in many of the States of America, with some modifications; although it has received a somewhat different construction (*i*).

* These two statutes are in force in Australia, [* 3] New Zealand, and Upper Canada (*ii*). Australia, New Zealand, Upper Canada.

It has been frequently observed that the statute 13 Eliz. c. 5, was merely declaratory of what was previously the common law of the land (*k*). Lord Coke several times (*l*) comments on the word "declare," which is used in the statute, as showing that this was the case. Lord Mansfield, indeed, said (*m*) that the principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every object proposed by the statutes 13 and 27 Eliz. (*n*). 13 Eliz. c. 5, declaratory of the common law.

So it was said by the Supreme Court of the United States that the Acts of the 13 and 27 of Eliz. were considered as only declaratory of the principles of the common law (*o*).

As to the statute 13 Eliz. c. 5, it may well be doubted whether anything more was intended by these expressions, than that "whatever offends against the order and good morals of society is an offence against the law of England, and punishable at common law" (*p*); and that "the law abhors covin, and therefore every covinous act shall be void" (*q*). But be this as it may, the statute in question expressly laid down and more clearly defined the law on the subject; whereas the doctrine of the common law was so general as to be vague and difficult of application. How far this is so.

(*i*) Story, Eq. Jur. 12th ed. ss. 427–434.
(*ii*) 3 Burge, Col. Law, 644; see The Laws of the Australasian Colonies, by J. D. Wood, 12 et seq.
(*k*) Per Lord Brougham in *Rickards* v. *Attorney-General*, 12 Cl. & F. 44: and see *Barton* v. *Vanheythuysen*, 11 Hare, 126, 132; *Ryall* v. *Rolle*, 1 Atk. 178.
(*l*) Co. Lit. 76 a, 290 b; 3 Rep. 82 b.
(*m*) In *Cadogan* v. *Kennett*, Cowp. 434.
(*n*) See also *Ex parte Mayor*, 34 L. J. Bkcy. 25.
(*o*) *Hamilton* v. *Russell* (Amer.), 1 Cranch, 309; Bump. Fr. Conv. (Amer.), 2nd ed. 10.
(*p*) Lofft, 385.
(*q*) 3 Com. Dig. p. 295.

As to the statute 27 Eliz. c. 4, the proposition here laid down seems too extensive. The statute, indeed, as it is now construed in favour of subsequent purchasers defeats any voluntary conveyance, whether fraudulent or not. Judicial decisions in England have even gone so far as to avoid a voluntary conveyance in favour of a subsequent purchaser who bought with full notice of that voluntary conveyance (*r*).

Generality and simplicity of the statutes.

[* 4] * In one respect, however, both these statutes were moulded in strict conformity with the rules of the common law. If "simplicity was the striking feature of the common law" (*s*), it was in an almost equal degree the chief feature of the statutes of Elizabeth, which are couched in very general terms, so as to include, and allow their application by the Courts, to, any fraudulent contrivances to which the fertility of man's imagination might have resorted, as a means of eluding a more precise and inflexible law.

The constant growth of fraud;

The statute 13 Eliz. c. 5, is expressed to be directed against fraudulent feoffments, &c., "more commonly used and practised in these days, than hath been seen or heard of heretofore" (*t*). So it has been since, and will ever be to the end of time; for fraud is infinite, and will always attempt to evade whatever is done for its suppression; to prune it back on one side is but to give it a stimulus to branch out with fresh vigour in some other direction (*u*). But the simplicity of the enactment (*v*) and—if the expression may be allowed—its expansiveness, have enabled the judges to bring within its scope, and extend its operations to, almost every kind of transaction resorted to by debtors to the prejudice of their creditors.

and the suppression of it by the statutes;

Which are to be construed liberally.

"These statutes," said Lord Mansfield, "cannot receive too liberal a construction or be too much extended in suppression of fraud" (*w*). So in *Twyne's*

(*r*) Post, p. 193.
(*s*) Sug. Pow. 8th ed. Introduction, p. 1.
(*t*) Appendix No. I.
(*u*) See *Mortlock* v. *Buller*, 10 Ves. 306; *Lawley* v. *Hooper*, 3 Atk. 279; Story, Eq. Jur. 12th ed. s. 186.
(*v*) In *Ryall* v. *Rolle*, 1 Atk. 165, 184-5, Lord Hardwicke said, "the Act was made in the simplicity of former times, long before those large and airy notions of credit prevailed which have been since introduced;" S. C. 1 Ves. 348, 374.
(*w*) In *Cadogan* v. *Kennett*, Cowp. 434; et vide Moo. 617; see Bump. Fr. Conv. (Amer.), 2nd ed. 12.

Case (*x*) it was resolved that "because fraud and deceit abound in these days more than in former times, all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud."

Neither statute speaks of *voluntary* conveyances.

The word "voluntary" is not to be found in either of the two statutes of Elizabeth (*y*). Both statutes are pointed at *fraudulent* conveyances.

* This limits the scope of the statute 13 Eliz. [* 5] c. 5; for it follows that a conveyance cannot be avoided under that statute *merely* because it is voluntary. That fact, of itself, does not necessarily bring the conveyance within the statute (*z*). So Lord Mansfield said, "the statute [13 Eliz. c. 5] does not militate against any transaction bonâ fide, and where there is no imagination of fraud" (*a*).

Construction of 27 Eliz. c. 4, in England

By the construction that the statute 27 Eliz. c. 4, has received in England, a conveyance of real estate or chattels real is always void as against a subsequent purchaser for value, if it be voluntary, because it is deemed fraudulent in law, though in fact it may have been perfectly free from any taint of fraud (*b*). But it is not necessary that a conveyance should be voluntary in order to come within it. If executed with express intent to defraud, it will be void by the statute (*c*).

In America.

In America, however, the statute 27 Eliz. c. 4, has received a somewhat different construction, and it seems now to be settled law there that a voluntary conveyance is not avoided by a subsequent sale to a purchaser with actual notice of it (*d*). In the United States it seems the better doctrine that a voluntary conveyance will be upheld if *bonâ fide* even against a subsequent purchaser *without* notice (*e*).

(*x*) 3 Rep. 82 a; and see *Wimbish* v. *Tailboys*, Plowd. 59; Rob, Fraud. Conv. 542.

(*y*) *Holloway* v. *Millard*, 1 Mad. 418; Bump. Fr. Conv. (Amer.), 2nd ed. 263, 264.

(*z*) Post, pp. 36, 50.

(*a*) *Cadogan* v. *Kennett*, 2 Cowp. 434; *Mackey* v. *Douglas*, L. R. 14 Eq. 121; post, p. 36.

(*b*) *Townshend* v. *Windham*, 2 Ves. 10; *Trowell* v. *Shenton*, 8 Ch. D., per James and Cotton, L.JJ., 325.

(*c*) *Perry-Herrick* v. *Attwood*, 2 D. G. & J. 39.

(*d*) Story, Eq. Jur, 12th ed. ss. 427, 428; *Sterry* v. *Arden* (Amer.), 12 Johns. 536.

(*e*) *Cathcart* v. *Robinson* (Amer.), 5 Peters, 264, 280; Story, Eq. Jur. 12th ed. ss. 428, 429; Kent, Com. 12th ed. vol. 4, 464.

Constructive fraud under 13 Eliz. c. 5.

The statute 13 Eliz. c. 5, is directed not only against such transfers of property as are made with the express intention of defrauding creditors; but, as has been justly remarked, extends as well to such as virtually and indirectly operate the same mischief, by abusing their confidence, misleading their judgment, or secretly undermining their interests To obviate this, it has gradually grown into a practice to regard certain acts or circumstances as indicative of a so-called fraudulent intention [* 6] in the * construction of the statute, although perhaps there was, in fact, no actual fraud or moral turpitude. It is difficult in many cases of this sort to separate the ingredients which belong to positive and intentional fraud from those of a mere constructive nature, which the law thus pronounces fraudulent upon principles of public policy (*f*).

To draw any definite invariable line of distinction between moral and technical fraud, on the one hand, or between actual and constructive fraud on the other, would be next to impossible, and could rarely serve any useful purpose.

But there are certain circumstances the presence of which is to be taken as conclusive evidence of fraud, and which will invariably avoid the conveyance.

The most ordinary form of constructive fraud against creditors under the statute 13 Eliz. c. 5, is that a voluntary conveyance made by a man deeply indebted is void (*g*).

By the construction the statute 27 Eliz. c. 4, has received in England, *the mere fact* that the settler has executed a subsequent conveyance of the same lands to a bonâ fide purchaser for value is of itself conclusive evidence of a fraudulent intention in law at the time he executed the voluntary conveyance (*h*).

27 Eliz. c. 4, not merely declaratory of common law,

The statute 27 Eliz. c. 4, cannot, so far, at least, as regards its operation in cases of constructive fraud, be considered as merely, declaratory of the common law, notwithstanding what Lord Mansfield said in *Cadogan* v.

(*f*) Story, Eq. Jur. 12th ed. s. 349; Bump. Fr. Conv. (Amer.), 2nd ed. 25.

(*g*) See post, pp. 35 et seq.

(*h*) See post, pp. 187 et seq.

Kennett (*i*); for it introduced a perfectly new and distinct protection to purchasers which was before unknown (*k*). This appears from *Upton* v. *Bassett* (*l*), mentioned in *Twyne's Case* (*m*), where "it was agreed that, by the common law, an estate made by fraud should be avoided only by him who had a *former* right, title, interest, debt, or demand, as (33 Hen. 6) a sale in open market by covin shall not bar a right which is more ancient; nor a [* 7] covinous gift shall * not defeat execution in respect of a former debt; but he who hath right, title, interest, debt, or demand more puisne shall not avoid a gift or estate precedent, by the common law" (*n*).

It is only by virtue of the statute 27 Eliz. c. 4, therefore, that a purchaser can avoid a *prior* voluntary conveyance, &c., made use of to defraud him. — which it goes beyond;

A voluntary assignment of chattels, which are not within the statute, is still good against a subsequent purchaser (*o*); for the common law does not touch such a case of constructive fraud.

This, however, only refers to the doctrine that, in general, every *voluntary* conveyance is void as against a subsequent purchaser; the common law did not reach such cases, in which the fraud is created, or rather definitely pointed out, by the construction put upon the statute in question. But it seems that the common law would have been capable of avoiding any conveyance made with the express purpose of defrauding even a subsequent purchaser. Thus Lord Cranworth said, in *Perry-Herrick* v. *Attwood* (*p*), that the jurisdiction of the Court in such cases existed long before the statute 27 Eliz. c. 4, "which can only be intended to give a more clear and distinct jurisdiction, and a more extended remedy." — except where there is *actual* fraud.

The statute 13 Eliz. c. 5, is in very general words (*q*), and makes void against creditors all manner of alien- — 13 Eliz. c. 5,

(*i*) Cowp. 434; ante, p. 3.
(*k*) Ante, p. 5.
(*l*) 3 Rep. 83 a.
(*m*) 3 Rep. 80 b.
(*n*) *Barton* v. *Vanheythuysen*, 11 Hare, 126, 132–3; post, p. 204.
(*o*) *Jones* v. *Croucher*, 1 S. & S. 315; *Bill* v. *Cureton*, 2 My. & K. 512; infra, p. 204.
(*p*) 2 De G. & J. 21, 40.
(*q*) Ante, p. 2.

ations of property, judgments, &c., had or made with the intention of delaying or defrauding them.

follows the civil law.

In this it follows, not only the common law of England, but also the Roman civil law. By that law it was provided that all acts, of whatever nature, done by debtors to defraud their creditors should be revoked (*r*) ; as to voluntary alienations, whether the donee knew of the [* 8] prejudice done to creditors or not (*s*) ; and as * to alienations not voluntary, if the grantee knew of the fraud (*t*), but not otherwise ; for the debtor's knavish intention ought not to cause a loss to those who deal with him in a lawful commerce and who have no share in the fraud (*u*) ; and to oblige him who purchased a thing of a debtor to make restitution of it, it was not enough that the purchaser knew that the said debtor had creditors, but he must have been privy to the design of *defrauding* them. For many of those who have creditors are not insolvent, and one does not become an accomplice in the fraud except by taking part in it (*v*); and (as is the case under the statute 13 Eliz. c. 5) any circuitous means by which a debtor attempted to defraud creditors was declared void : viz., by giving up a security to a person who owed *him* money (*w*), or suffering a creditor to obtain judgment where he had a good defence (*x*), &c. If a debtor did or omitted to do any other thing by which he caused a loss or a voluntary diminution of his goods to the prejudice of his creditors (*y*), everything done by such collusion was re-

(*r*) Dig; lib, 42, tit. 8, par. 1, ss. 1, 2 ; Domat's Civil Law, book 2, tit. 10, sec. 1, par. 1 ; 1 Fonbl. Eq. 270.

(*s*) "Simili modo dicimus et ei cui donatum est, non esse quærendum an, sciente eo cui donatum gestum sit ; sed hoc tantum. An fraudentur creditores? Nec videtur affici injuriâ is qui ignoravit, cum lucrum extorqueatur, non damnum infligatur." Dig. lib. 42, tit. 8, par. 6, sec. 11.

(*t*) "Ait prætor, Quæ fraudationis causâ gesta erunt cum eo qui fraudem non ignoraverit . . . . actionem dabo." Ibid. par. 1, secs. 7–8.

(*u*) Domat's Civil Law, book 2, tit. 10, sec. 1, par. 3 ; see *Copis* v. *Middleton*, 2 Mad. 410–429, infra, p. 81.

(*v*) Domat, book 2, tit. 10, sec. 1, par. 5. "Quod ait prætor, scienter sic accipimus te conscio et fraudem participante ; non enim si simpliciter scio illum creditores habere, hoc sufficit ad contendendum teneri eum in factum actione : sed si particeps fraudis est." Dig. lib. 42, tit. 8, par. 10, secs. 3 and 4.

(*w*) "Si pignora liberet.' Ibid. par. 2.

(*x*) "Verum etiam si forte datâ operâ ad judicium non adfuit." Ibid. par. 3, sec. 1.

(*y*) "Et qui aliquid fecit ut desinat habere quod habet." Ibid. par. 3, sec. 2. "In fraudem facere etiam eum qui non facit quod debet facere." Ibid. par. 3.

voked, and the creditors restored to the first right of their debtor (*z*). So payment of a debt by a debtor before it was really due (*a*), or putting himself under obligation for what he did not owe (*b*), was liable to be revoked. But, as with us, it was no fraud for a man to pay one bonâ fida creditor in preference to others, although because of such payment there did not remain enough to satisfy the other * creditors (*c*), [* 9] whether the payment was made willingly or on compulsion; the other creditors ought to blame themselves for not having been as watchful of their interests as he has been who has obtained payment (*d*). As in the English law, the intention of defeating creditors at the time of the alienation is what is looked at (*e*).

It will be found that all these provisions are contained in, or have, by judicial interpretation and implication, been engrafted on, the statute 13 Eliz. c. 5.

The long operation of the statutes.

These two Statutes of Fraudulent Conveyances have been in operation for upwards of 300 years, and a vast number of cases have been directly decided upon them, besides many others on which they have exercised an indirect influence.

13 Eliz. c. 5, protects the interests of creditors.

As to the statute 13 Eliz. c. 5, at least, which relates to the protection of creditors, it may be said that its

(*z*) "Quodcumque igitur fraudis causâ factum est, videtur his verbis revocari, qualecumque fuerit, nam late ista verba patent. Sive ergo rem alienavit sive acceptilatione vel pacto aliquem liberaverit." Ibid. par. 1, sec. 2.

(*a*) Ibid. par. 10, sec. 12. "Omnes debitores qui in fraudem creditorum liberantur per hanc actionem revocantur in pristinam obligationem." Ibid. par. 17.

(*b*) "Sive se obligavit fraudandorum creditorum causâ." Ibid. par. 3.

(*c*) "Qui suum recipiat, nullam videri fraudem facere." Dig. lib. 42, tit, 8, par. 6, sec. 6. "Qui debitam pecuniam recepit antequam bona debitoris possideantur, quamvis sciens prudensque solvendo non esse recipiat non timere hoc edictum; sibi enim vigiliavit." Ibid. sec. 7.

(*d*) "Licet creditoria vigilare ad suum consequendum. Quid ergo si cum in eo essent ut bona debitoris mei venirent, solverit mihi pecuniam; an actione revocari ea possit a me? An distinguendum est, is obtulerit mihi, an ego illi extorserim invito? Et si extroserim invito, revocetur? Si non extorserim non revocetur? Sed vigilavi: meliorem meam conditionem feci: jus civile vigilantibus scriptum est. Ideo non revocatur id quod percepi." Ibid. par. 24, apud finem.

(*e*) "Fraudis interpretatio semper in jure civili non ex eventu duntaxat sed ex consilio quoque desideratur." Ibid. lib. 50, tit. 17, par. 79.

effect has been, throughout this length of time, uniformly beneficial. It has been well observed (*f*) that "it must be a fundamental policy of all enligthened nations to protect and subserve the rights of creditors." The absence of such protection must, in the language of the statute, be "not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between Man and Man, without the which no Common Wealth or civil society can be maintained or continued." For the well-being of a great commercial country like England, it must always be a matter of the highest importance that the interests of creditors should be secured by every possible means consistently with justice.

Extended to other countries.

It may be said that this statute has, by its 300 years [* 10] of activity, *exercised a wholesome influence on the commerce and industry, and therefore on the prosperity, of this country. Its adoption in other countries, as Ireland (*g*), the Isle of Man (*h*), and most of the colonies of Great Britain (*i*), and its universal adoption in America (*k*), are proofs of its value and efficacy. Its principles have likewise been adopted from the civil law by France, Holland, and Spain (*l*).

13 Eliz. c. 5, applies to *others* as well as creditors.

The statute 13 Eliz. c. 5, extends to creditors *and others* (*m*), and is not in terms confined to fraudulent dispositions; for it makes void any disposition which is intended to delay, hinder, or defraud creditors and others, &c. (*n*).

Works concurrently with the Bankruptcy Acts.

The statute 13 Eliz. c. 5, has always been, both in principle and practical operation, quite distinct from and independent of the bankrupt laws, but has worked concurrently and, for the most part harmoniously, with the long series of Bankruptcy Acts which have succeeded one another, with various provisions and amend ments which the growth of commerce and civilization

(*f*) Story, Eq. Jur. 12th ed. s. 350.
(*g*) 10 Car. 1, sess. 2, c. 3.
(*h*) See Mills' Stats. of Isle of Man, p. 238. *Corlett* v. *Radcliffe*, 14 Moore, P. C. 121.
(*i*) 3 Burge, Col. Law. 644.
(*k*) Story, Eq. Jur. 12th ed. s. 353; et supra, p. 2; 4 Kent, Com. 12th ed. 463.
(*l*) 3 Burge, Col. Law, 616.
(*m*) Section 1; post, pp. 64, 65.
(*n*) Section 1; post, pp. 17 et seq.

has rendered necessary for the time being, and which the changing nature of the relations between debtor and creditor has required; whereas this statute of Elizabeth is as effective now as it was at its first enactment, on account of its simplicity and comprehensiveness.

The difference between 13 Eliz. c. 5, and the Bankruptcy Acts.

The question whether a deed is void under the statute 13 Eiz. c. 5, is a very different one from the question whether that deed is void under any of the successive Bankruptcy Acts.

The one great object of the statute 13 Eliz. c. 5, is to prevent debtors from dealing with their property in any way to the prejudice of their creditors; it, in fact, considers a man deeply indebted as no longer the true owner of his property, but, as it were, a trustee of it for the benefit of his creditors. As in the Statute of Fraudulent Devises it was an old rule that, where a man devised land for the payment of debts and legacies, the debts should first be satisfied, for Lord Nottingham said he would not "make a man *sin [* 11] in his grave" (*o*); so the statute 13 Eliz. c. 5, gives a priority to debts over voluntary and fraudulent conveyances, and attempts to prevent a man in his lifetime from sinning against his just creditors.

The meaning of this statute, said Jessel, M.R., in *Middleton* v. *Pollock* (*p*), "is that the debtor must not retain a benefit for himself. It has no regard whatever to the question of preference or priority among the creditors of the debtor." A settlement, therefore, which preferred certain creditors and tended to defeat the others, might be good under this statute of Elizabeth.

The primary aim of all the successive Bankruptcy Acts however, is to obtain an equal distribution of the debtor's assets among his creditors.

The assumption when a man is made bankrupt is, that his debts are in excess of his available assets (*q*); and the ruling object of the statutes on the subject is, to take and divide amongst the creditors, in proportion to their debts, whatever assets there may be, and then,

(*o*) *Brunsden* v. *Stratton*, Prec. Chan. 520.
(*p*) 2 Ch. D. 108, 109; see *Alton* v. *Harrison*, L. R. 4 Ch. 622, and *Ex parte Games*, 12 Ch. D. 314.
(*q*) *Ex parte Russell*, 19 Ch. D. 588.

in consideration of the debtor's giving up the whole of his property, to discharge him from any future liability with respect to his then debts.

Assignment of *whole* property not necessarily void under 13 Eliz. c. 5;

Nor, again, is it material under this statute of Elizabeth whether the assignment by the debtor is of the *whole* of his property, present or future, or of any part of it. So it was said by Thesiger, L. J., in *Ex parte Games* (*r*), quoting, with approval, the words of Giffard, L.J., in *Alton* v. *Harrison* (*s*): "I have no hesitation in saying that it makes no difference in regard to the statute of Elizabeth whether the deed deals with the whole, or only a part, of the grantor's property. If the deed is bonâ fide—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the statute of Elizabeth."

but is an act of bankruptcy.

Under the Bankruptcy Act, 1883 (*t*), however, a debtor commits an act of bankruptcy if he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof.

[* 12] * It therefore follows that if a deed is void under the statute 13 Eliz. c. 5, because it is thereby deemed fraudulent in law, it at once also becomes fraudulent under the Bankruptcy Act, an act of bankruptcy, and void against the trustee in bankruptcy (*u*).

But the converse of this is not true.

Deed good under 13 Eliz. c. 5, but void under Bankruptcy Acts.

A deed may be a good deed under the statute 13 Eliz. c. 5, and yet may come within the Bankruptcy Acts.

Thus, an assignment by a man of his *whole* property to a trustee for creditors generally may be a good deed under the statute 13 Eliz. c. 5 (*v*); but is an act of bankruptcy under the Bankruptcy Act, 1883, if impeached within three months of its execution (*w*); and

(*r*) 12 Ch. D. 324.
(*s*) L. R. 4 Ch. 626; *Ryall* v. *Rolle*, 1 Atk. 165, 180.
(*t*) Section 4 (1) B; and see section 4 (1) A.
(*u*) See *Billiter* v. *Young*, 6 E. & B. 1; *Young* v. *Waud*, 8 Ex. 221, 234, where Lord Wensleydale classified fraudulent deeds which are acts of bankruptcy; *Devon* v. *Watts*, 1 Doug. 86, and *Hassells* v. *Simpson*, 1 Doug. 89, 95; Com. Dig. tit. Bankrupt (C.) 8; and *Ex parte Chaplin*, 26 Ch. D. 319.
(*v*) Post, pp. 96 et seq.
(*w*) 46 & 47 Vict. c. 52, s. 4 (1) (A); 32 & 33 Vict. c. 71, s. 6 (1); Robson, Bkcy. 5th ed. 154 et seq.; post, p. 94.

was under the Act of 1869, even though for valuable consideration (*x*), unless also bonâ fide (*y*).

Again, a deed may be a preference of one creditor over others, and yet be a good deed under this statute of Elizabeth (*z*); while under the bankruptcy law, if impeached within the proper time, it would be void as a fraudulent preference (*a*), and would now be an act of bankruptcy (*b*).

Voluntary settlements avoided by Bankruptcy Act, 1883.

By the Bankruptcy Act, 1883 (*c*), all voluntary settlements made by any settlor within two years before bankruptcy are void against the trustee in his bankruptcy; and if made within ten years they are also similarly void under certain circumstances; but there is an exception in favour of settlements "made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage *in right of his wife*." Under the statute 13 Eliz. c. 5, a settlement of such property would, subject to the wife's equity to a settlement (*d*), be equally voluntary and void against creditors with *that of property belonging to [*13] the husband in his own right (*e*). A question therefore may possibly arise as to whether such a settlement, being void under this statute of Elizabeth, but being expressly favoured by the Bankruptcy Act, would be an act of bankruptcy; but it is apprehended the section, taken as a whole, merely *invalidates* certain settlements and transfers of property, and that such a settlement, if void under this statute of Elizabeth, would be an act of bankruptcy.

The statute 27 Eliz. c. 4, has no relation to the Bankruptcy Acts.

Purchasers protected by 27 Eliz. c. 4.

The statute Eliz. c. 4, it will be seen (*f*) makes void as against subsequent purchasers all transfers of real estate or chattels real made to defraud them, nearly in

(*x*) See post, p. 94; and *Siebert* v. *Spooner*, 1 M. & W. 714.
(*y*) *Baxter* v. *Pritchard*, 1 A. & E. 456; *Rose* v. *Hancock*, 1 A. & E. 460; Robson, Bkcy. 5th ed. 156 et seq.
(*z*) *Middleton* v. *Pollock*, 2 Ch. D. 104.
(*a*) 46 & 47 Vict. c. 52, s. 48; post, p. 100; and see Robson, Bkcy. 5th ed. 167 et seq.
(*b*) 46 & 47 Vict. c. 52, s. 4 (1) (C).
(*c*) 46 & 47 Vict. c. 52, s. 47; post, pp. 42 et seq.
(*d*) See now 45 & 46 Vict. c. 75, ss. 1, (1), 2, 5.
(*e*) *Warden* v. *Jones*, 2 De G. & J. 76; *Spirett* v. *Willows*, 3 D. J. & S. 293.
(*f*) Post, pp. 186 et seq.

the same terms as are employed by the statute 13 Eliz. c. 5. in favor of creditors.

Difference between the two statutes.

It is clear, however, that the operation and construction of these two acts must be materially different.

Under 13 Eliz. c. 5, against creditors, fraud is complete at the time conveyance is executed.

Under the statute 13 Eliz. c. 5, the fraud against creditors, if any, exists, theoretically at least, *at the time* the conveyance, &c., is made (*g*). As soon as that is executed, an act has been done upon which the statute is capable of operating at once. The ground on which a disposition of property has been held fraudulent against future creditors, when not made with the intention of prejudicing any existing creditor, has been that the intention of defeating those future creditors must be taken to have been in the mind of the debtor at the time (*h*).

Thus it was agreed by Sir Edward Coke and the Court of King's Bench, in *Stone* v. *Grubham* (*i*), that "as to the matter of fraud, the same ought to be fraud at the beginning;" . . . . and "if a man hath any intention to evade out of the statute of 13 Eliz. c. 5, [* 14] whatsoever * he shall say afterwards will not anyways salve and amend the matter, but the same shall be fraud, and shall be within the statute."

Intention of the conveyer, whether the fraud is actual or merely constructive.

A conveyance which is constructively fraudulent under the statute 13 Eliz. c. 5, and for that reason void, is so because, from the construction to be put on all the circumstances of the case, it must be *presumed* that the conveyance was made with the *intention* of defrauding creditors (*k*). If the conveyance is not void as being voluntary and made by a person indebted, the question is as to the motives of the person making

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(*g*) *Walker* v. *Burrows*, 1 Atk. 93; *Holloway* v. *Millard*, 1 Mad. 420; *In re Johnson*, 20 Ch. D. 389, S. C. 51 L. J. (N.S.) Ch. 503; *In re Maddever*, 27 Ch. D. 523, 526, 530; Story, Eq. Jur. 12th ed. s. 353, n.; post, pp. 15, 35, 67.

(*h*) So also, under the earlier bankrupt statutes, the settlor must have been a trader at the time when he made the voluntary settlement; see *Lilly* v. *Osborn*, 3 P. W. 298; 1 Jac. 1, c. 15, s. 5; this distinction does not exist under 46 & 47 Vict. c. 52; see post, pp. 61 et seq.

(*i*) 2 Buls. 225.

(*k*) *Holmes* v. *Penney*, 3 K. & J. 90, 99; *Freeman* v. *Pope*, L. R. 5 Ch. 538, 543; *In re Johnson*, 20 Ch. D. 389, S. C. 51 L. J. (N.S.) Ch. 503; *In re Maddever*, 27 Ch. D., per North, J., at p. 526; but see *Ex parte Mercer*, 17 Q. B. D. 290, post, pp. 38, 41.

the deed, whether or not his intention was to defeat creditors (*l*).

On the other hand, it is evident that there must be two separate acts to constitute a fraud cognizable by the statute 27 Eliz. c. 4; first, a conveyance fraudulent by being set up against the subsequent purchaser; and secondly, the conveyance to that purchaser.

Under 27 Eliz. c. 4, against purchasers, the fraud not complete until the *second* conveyance.

Thus there must be two independent inconsistent dispositions by the grantor, and the fraud can only be collected from those two dispositions taken together, and constituting one fraudulent act within the statute (*m*).

Until the second conveyance is executed, the fraud is only inchoate, for a man may make a voluntary or other fraudulent conveyance, with or without the intention of using it to cheat a subsequent purchaser; but if he does not actually execute a second conveyance, or enter into a contract for sale, it is clear no one can be injured by the first.

As against creditors, then, the animus fraudandi must have, or must be taken to have, existed when the conveyance, &c., was made.

As against purchasers, it matters not why the first conveyance * was made; it is sufficient if it [* 15] was subsequently made a means of attempting to deceive a purchaser.

This distinction is in harmony with all the authorities. It may, therefore, be stated as a settled principle that in order to decide whether a disposition of property is void as to creditors, under the statute 13 Eliz. c. 5, the state of circumstances *at the time* the conveyance is executed must be regarded (*n*).

Under 13 Eliz. c. 5, the circumstances at the time of conveyance to be regarded;

(*l*) *Nunn* v. *Wilsmore*, 8 T. R. 521, 530; *Henderson* v. *Lloyd*, 3 F. & F. 7; *Ware* v. *Gardner*, L. R. 7 Eq. 317; *In re Pearson*, 3 Ch. D. 807; *Ex parte Mercer*, 17 Q. B. D. 290. The principle, however, is to be collected from a general survey of all the authorities, rather than by any express dicta: see also *French* v. *French*, 6 D. M. & G. 95, 101; *Neal* v. *Day*, 28 L. J. Ch. 45, 47, post, pp. 78, 84.

(*m*) *Walker* v. *Burrows*, 1 Atk. 94.

(*n*) See ante, p. 13; post, pp. 35, 67; *In re Johnson*, 20 Ch. D. 389, S. C. 51 L. J. (N.S.) Ch. 503; *In re Maddever*, 27 Ch. D. 523.

to the payment of debts, or liable to be taken in execu-
[*18] tion at the time of the fraudulent *conveyance (*f*); but, in general, not any not so liable (*g*). The reason of this is, that a settlement of property which creditors could not have got at puts no property out of their reach, and cannot be fraudulent against them (*h*); and consequently, when by a change in the law, certain property is made liable to creditors which before was not so, that property then becomes also liable to the provisions of the statute of Elizabeth (*i*).

Copyholds formerly not, but now are.

It was formerly held that copyholds were not within the statute. In *Mathews* v. *Feaver* (*k*) Lord Kenyon (then Sir Lloyd Kenyon) said: "I am not satisfied as to the nature or the value of the copyhold premises, which, generally speaking, are not subject to debts, and therefore the assignment of them can never be fraudulent against creditors."

By 1 & 2 Vict. c. 110, s. 11 (the Judgment Act, which came into operation on October 1, 1838), copyholds where made liable to be taken in execution by writ of elegit, and therefore, because capable of being taken in execution, came within the statute of Elizabeth (*l*).

Money, bonds, choses in action, and stock formerly no.

So likewise money (*m*), bonds, and choses in action of all kinds were not formerly within the statute, because they could not be reached by an execution (*n*).

Thus, a settlement or transfer of stock, which was not liable to debts or execution in the absence of any

(*f*) *Sims* v. *Thomas*, 12 A. &. E. 536; *Turnley* v. *Hooper*, 2 Jur. (N. S.) 1081.

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(*h*) See *Mathews* v. *Feaver*, 1 Cox, 278; *Turnley* v. *Hooper*, 2 Jur. (N.S.) 1081; 1 Story, Eq. Jur. 12th ed. s. 367.

(*i*) See *Sims* v. *Thomas*, 12 A. &. E. 536, 554; and see Bump. Fr. Conv. (Amer.), 2nd ed. 236.

(*k*) 1 Cox, 278; and see *Hassells* v. *Simpson*, 1 Doug. 89–93.

(*l*) See Scriven, 5th ed. pp. 39–40. *Twyne's Case*, 1 Sm. L. C. 8th ed. pp. 38, 39.

(*m*) *Fletcher* v. *Sedley*, 2 Vern. 490; Vin. Abr. tit. Fraud. (F), 22, vol. 13, p. 522; *Ex parte Shortland*, 7 Ves. 88; *Kensington* v. *Chantler*, 2 Mau. &. S. 36; *Ex parte Skerratt*, 2 Rose, 384. But see *Partridge* v. *Gopp*, Amb. 596; et post, p. 22.

(*n*) *Norcutt* v. *Dodd*, Cr. & Ph. 100; *Edgell* v. *Haywood*, 3 Atk. 352, 356; *Duffin* v. *Furness*, Sel. Ca. Ch. 77; *Ashe* v. *Low*, Hayes & J. 287; *Sims* v. *Thomas*, 12 A. & E. 536; *Adames* v. *Hallett*, L. R. 6 Eq. 468.

lien (*o*), could not be *set aside as fraudulent [*19] against creditors (*p*); and although, under the peculiar circumstances of the case in *Rider* v. *Kidder*, (*q*) Lord Eldron, the settlor being dead, allowed the transfer to be made (*r*), he seems to have been of opinion that stock was not within the statute of Elizabeth, and assented to Lord Thurlow's opinion to that effect in *Dundas* v. *Dutens* (*s*). In *Taylor* v. *Jones* (*t*), however, the point does not seem to have been raised and a settlement of a sum of stock was set aside at the suit of creditors.

Before Judgment Act, settlements of stock or money void on bankruptcy or death of settlor.

Even before this Act, however, though a settlement of *stock* could not be impeached during the debtor's life, except under a commission of bankruptcy (*u*), it could be got at after his death (*v*), in the one case, the Court of Bankruptcy, and in the other the Court of Chancery, taking the whole estate into possession for the purpose of administration. After the debtor's decease, also, his creditors could sue the persons claiming under the fraudulent deed as executors de son tort, the property settled being assets in their hands (*w*); from which it may be inferred that a settlement of stock, &c., made before 1 & 2 Vict. c. 110, might be void against creditors if the debtor had become a bankrupt or died.

And in the same manner, a settlement of *money* could be set aside at the settlor's death (*x*), and though, in his life, it could not be reached by creditors before this

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(*o*) *Cockrane* v. *Chambers*, note to *Horn* v. *Horn*, Amb. 79; *Nantes* v. *Corrork*, 9 Ves. 189; *Bank of England* v. *Lunn*, 15 Ves. 569–577; *McCarthy* v. *Goold*, 1 Ball & B. 389. But see *Guy* v. *Pearkes*, 18 Ves. 197, and *Horn* v. *Horn*, Amb. 79.

(*p*) *Dundas* v. *Dutens*, 1 Ves. Jun. 196–198.

(*q*) 10 Ves. 360.

(*r*) 10 Ves. 370 n. (50), 2nd ed. See also *Rider* v. *Kidder*, 13 Ves. 123; *Pringle* v. *Hodgson*, 3 Ves. 617.

(*s*) 1 Ves. Jun. 198; 2 Cox, 235, 240.

(*t*) 2 Atk. 600. As to sequestration of choses in action, see *Simmonds* v. *Kinnaird*, 4 Ves. 735; *Wilson* v. *Metcalfe*, 1 Beav. 263.

(*u*) *Pringle* v. *Hodgson*, 3 Ves. 617; *Rider* v. *Kidder*, 10 Ves. 360, 368.

(*v*) *McCarthy* v. *Goold*, 1 Ball & B. 387, 390; *Rider* v. *Kidder*, 10 Ves. 360, 368–9.

(*w*) See 2 Roll. Rep. 173; 2 Ben. & Dal. 94, pl. 16; Vin. Abr. tit. Fraud (C.), [illegible] 11; *Kitchin* v. *Dixson*, Gouldsb. 116, pl. 12; *Howes* v. [illegible] 271; *Edwards* v. *Harben*, 2 T. R. 587; *Stamford* [illegible] *Towr* [illegible] *tham*, 2 Ves. 11; *Shears* v [illegible] 12; [illegible] Drew 716.

(*x*) *W* [illegible] S [illegible] es in action, see per L [illegible] 100, 102.

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And in the same manner, a settlement of *money* could be set aside at the settlor's death (*x*), and though, in his life, it could not be reached by creditors before this

(*o*) *Cockrane* v. *Chambers*, note to *Horn* v. *Horn*, Amb. 79; *Nantes* v. *Corrork*, 9 Ves. 189; *Bank of England* v. *Lunn*, 15 Ves. 569–577; *McCarthy* v. *Goold*, 1 Ball & B. 389. But see *Guy* v. *Pearkes*, 18 Ves. 197, and *Horn* v. *Horn*, Amb. 79.

(*p*) *Dundas* v. *Dutens*, 1 Ves. Jun. 196–198.

(*q*) 10 Ves. 360.

(*r*) 10 Ves. 370 n. (50), 2nd ed. See also *Rider* v. *Kidder*, 13 Ves. 123; *Pringle* v. *Hodgson*, 3 Ves. 617.

(*s*) 1 Ves. Jun. 198; 2 Cox, 235, 240.

(*t*) 2 Atk. 600. As to sequestration of choses in action, see *Simmonds* v. *Kinnaird*, 4 Ves. 735; *Wilson* v. *Metcalfe*, 1 Beav. 263.

(*u*) *Pringle* v. *Hodgson*, 3 Ves. 617; *Rider* v. *Kidder*, 10 Ves. 360, 368.

(*v*) *McCarthy* v. *Goold*, 1 Ball & B. 387, 390; *Rider* v. *Kidder*, 10 Ves. 360, 368–9.

(*w*) See 2 Roll. Rep. 173; 2 Ben. & Dal. 94, pl. 16; Vin. Abr. tit. Fraud (C.), pl. 5, 7, 8, 11; *Kitchin* v. *Dixson*, Gouldsb. 116, pl. 12; *Howes* v. *Leader*, Cro. Jac. 271; *Edwards* v. *Harben*, 2 T. R. 587; *Stamford's Case*, 2 Leon. 223; *Townshend* v. *Windham*, 2 Ves. 11; *Shears* v. *Rogers*, 3 B. & Ad. 362; *Shee* v. *French*, 3 Drew 716.

(*x*) *Whittington* v. *Jennings*, 6 Sim. 493. As to choses in action, see per Lord Cottenham in *Norcutt* v. *Dodd*, Cr. & Ph. 100, 102.

Act by any process at law, it seems questionable whether, in some cases, equity could not have reached it. In [* 20] *Partridge* v. *Gopp* (*y*), children were * ordered to refund £500 each paid to them by their father, an insolvent executor, for their maintenance.

So it was laid down by Lord Cottenham in *Norcutt* v. *Dodd*, (*z*) that a chose in action, *after* the death of the assignor, because it was assets in the hands of the executor, could be reached by creditors.

Policies of assurance formerly not.

Lord Manners doubted, in *Grogan* v. *Cooke* (*a*), whether policies of life insurance were within the statute; but it is now settled that they are securities for money within the meaning of the 1 & 2 Vict, c. 110 (*b*), and it follows that they are subject to the claims of creditors under the statute 13 Eliz. c. 5, and it has in fact several times been so decided (*c*).

Purchase in name of child or third person formerly not;

It was at one time held (*d*) that, as money could not then be taken in execution, a purchase in the name of a child or third person was not within the statute. If the conveyance was declared void, the title to the property would remain in the grantor, and therefore the creditors could not seize it; and it was argued that the debtor might have *given* the money to the child or third person, who might himself have made the purchase; and that unless, as Lord St. Leonards expresses it (*e*), the purchase itself was substantially affected with fraud, the mere fact that the money of the debtor was laid out in the purchase of land for the benefit of a child would not be a reason for bringing the purchase within the statute.

Thus, also, a purchase by a husband in the joint names

(*y*) Amb. 596. See also *East India Co.* v. *Clavel*, Gilb. Eq. Rep. 37; Prec. Ch. 377.

(*z*) Cr. &. Ph. 100, 102.

(*a*) 2 Ball & B. 233.

(*b*) Section 12. *Law* v. *London, &c., Policy Company*, 1 K. & J. 223; *Robson* v. *McCreight*, 25 Beav. 272; *Stokoe* v. *Cowan*, 29 Beav. 637.

(*c*) *Stokoe* v. *Cowan*, 29 Beav. 637; *Jenkyn* v. *Vaughan*, 3 Drew. 419; *Skarf* v. *Soulby*, 1 Mac. & G. 364; *Penhall* v. *Elwin*, 1 Sm. & Giff. 267; *Freeman* v. *Pope*, L. R. 9 Eq. 206, S. C. L. R. 5 Ch. 538; *Taylor* v. *Coenen*, 1 Ch. D. 636.

(*d*) *Fletcher* v. *Sedley*, 2 Vern. 490; *Glaister* v. *Hewer*, 8 Ves. 199; *Duffin* v. *Furness*, Sel. Ca. Ch. 77; *Proctor* v. *Warren*, Sel. Ca. Ch. 78; *Barrack* v. *McCulloch*, 3 K. & J., per V. C. Wood, 117–118; and see Dart, V. & P. 5th ed. 938.

(*e*) Sug. V. &. P. 14th ed. p. 706.

of himself and his wife, though, perhaps, open to more suspicion (*f*), * has been considered not within [* 21] the statute (*g*), though the question was never fully settled (*h*). or joint purchase in names of self and wife.

But now by the Married Women's Property Act, 1882 (*i*), s. 10 (extending the Act of 1870, s. 6), it is provided that "nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband, to his wife, of any property which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed." This section, which is confined to "moneys," seems to apply at whatever time the fraud is committed. It will be simply a question of fraud or no fraud, as against the husband's creditors, in considering the validity of any deposit or investment made by the husband, or wife with her husband's moneys, whether made in the joint names of husband and wife or of husband, wife, and others. If in fraud of his creditors, it cannot be supported as a gift or an advancement to the wife (*k*).

But after a purchase by a man in the names of trustees in trust for such persons, &c., as he should appoint, an appointment by him in favour of wife and children was, of course, held voluntary, and within the statute; for he had in him an equitable estate (*l*). Purchase taken to trustees to hold as settlor should appoint.

Since January 1, 1838, the date of the operation of 1 & 2 Vict. c. 110, money can be taken in execution, and it therefore follows that a purchase in the name of a child, or wife, or third person on or after that date would be within the statute (*m*). Purchase in name of child wife, or third person now within statute.

The same seems now to be the settled law in America, where the point has been much discussed (*n*).

(*f*) *Christ's Hospital* v. *Budgin*, 2 Vern. 683.
(*g*) *Kingdon* v. *Bridges*, 2 Vern. 67.
(*h*) See Lord Hardwicke's observations, *Underwood* v. *Hitchcox*, 1 Ves. 280.
(*i*) 45 & 46 Vict. c. 75, s. 10. (*k*) *Re Eykyn*, 6 Ch. D. 115.
(*l*) *Ashfield* v. *Ashfield*, 2 Vern. 287; see *Barton* v. *Vanheythuysen*, 11 Hare, 126, 130; post, p. 200.
(*m*) *Barrack* v. *McCulloch*, 3 K. & J. 110; but see *Drew* v. *Martin*, 2 H. & M. 130.
(*n*) Bump. Fr. Conv. (Amer.), 2nd ed. 237, 238.

Sale of property and settlement of purchase-money within the statute

[* 22] * So, too, purchase-money received upon a sale of property cannot now be settled so as not to be within the statute. So Lord Hatherly, then Sir W. P. Wood, V.C., said in *Barrack* v. *McCulloch* (*o*): "The late case of *French* v. *French* (*p*) shows that property purchased, as it was in that case, with the goods of the debtor is within the statute. The debtor in that case sold his business and stock-in-trade in consideration of a money payment, and also of an annuity to himself and a contingent annuity to his wife if she survived him; and it was held that the annuity so purchased for his wife was a gift to her from her husband, which was void under the statute, as against his creditors."

And this principle seems now to apply to such cases, even if the subject-matter of the sale, as the goodwill of a trade, cannot itself be taken in execution (*q*)

But it seems that money voluntarily spent by a husband on his wife's property in redemption of the land-tax (*r*), in building improvements, or the enfranchisement of copyholds, even if the husband was then insolvent (*s*), cannot be followed by his creditors; and therefore is not within the statute.

Judgment Act.

But by 1 & 2 Vict. c. 110 (the Judgment Act), which came into operation on the 1st of October, 1838, many kinds of property have been made available to creditors for the payment of debts.

Copyholds, money, cheques, bills notes, bonds,

Since this Act, copyhold land (*t*), money, and bank-notes (*u*), whether of the Bank of England, or of any other bank or bankers, and any cheques, bills of ex-[* 23] change, promissory notes, bonds, * specialties, or

(*o*) 3 K. & J. 117, 118.

(*p*) 6 D. M. & G. 95.

(*q*) *French* v. *French*, 6 D. M. & G. 95; *Neale* v. *Day*, 28 L. J. Ch. 45.

(*r*) *Burrough's Case*, 17 Ves. 267.

(*s*) *Campion* v. *Cotton*, 17 Ves. 263; and see *Hammer* v. *Tilsey*, 1 John. 486; *Stepney* v. *Biddulph*, 13 W. R. 576; Sug. V. & P. 14th ed. 707; Dart, V. & P. 5th ed. 938, 939. The contrary is the law in America: see Bump. Fr. Conv. (Amer.), 2nd ed. 239, 240.

(*t*) 1 & 2 Vict. c. 110, s. 11; and see *Bott* v. *Smith*, 21 Beav. 511.

(*u*) Section 12; *Barrack* v. *McCulloch*, 3 K. & J. 110; *Stokoe* v. *Cowan*, 29 Beav. 637. Money, &c., is subject to seizure in the same way as other chattels were before this Act, except that where money is seized it is not necessary that the form of sale should be gone through: *Collingridge* v. *Paxton*, 11 C. B. 683.

other securities for money (*v*), and stock and shares in public funds and public companies (*w*), are to be considered as "goods and chattels" within the meaning of this section (*x*); even where, in the case of stock or shares, the provision of the Act as to obtaining a charging order could not be complied with, because the stock or shares were not standing in the name of any one in trust for the debtor, nor of the debtor himself (*y*). stocks, and shares are now within the statute.

But even now property which is not liable to execution is not within the statute. After the conveyance is made, alterations of the law, subjecting the property comprised in it to execution, do not bring it within the statute of Elizabeth (*z*). But, whether the property be capable of being taken in execution or not, if the settlor dies or becomes bankrupt, the property is then brought within the statute (*a*). Property now within statute only if liable to execution, or if settlor dead or bankrupt.

The principle is, that to convey away any property against which execution can issue is a fraud on creditors, but not a conveyance of that which they could not (but for the conveyance) have touched; so that, by successive statutes giving creditors power over different kinds of property, the operation of the statute 13 Eliz. c. 5, has been gradually extended.

Where, by a subsequent improvement or alteration in the law, a better and more effectual or a different mode of affecting the property by way of execution has been created, it is immaterial so long as there was at the date of the settlement *any* remedy against the property (*b*); nor does it make any difference that the new mode has been resorted to rather than that which was alone in force when the deed was executed (*c*). Improvement in mode of reaching property.

*A term to which a man was entitled in right [* 24] of his wife as administratrix of her first husband, or which Term held as administrator.

(*v*) Mortgages of realty: *Spirett* v. *Willows*, 3 D. J. & S. 293.
(*w*) Sections 14 and 15; *Warden* v. *Jones*, 2 De G. & J. 76; *Goldsmith* v. *Russell*, 5 D. M. & G. 547.
(*x*) 13 Eliz. c. 5, s. 1; ante, p. 17, as to what are goods and chattels, note (*a*).
(*y*) *Goldsmith* v. *Russell*, 5 D. M. & G. 547–553.
(*z*) *Sims* v. *Thomas*, 12 Ad. & E. 536–554; Story, Eq. Jur. 12th ed. ss. 366, 367. The same is the law in Upper Canada: see *Bank of U. C.* v. *Shickluna*, 107 Chy. 157.
(*a*) See ante, p. 19; and see notes to *Twyne's Case*, 1 Sm. L. C. 8th ed. 38.
(*b*) See Bump. Fr. Conv. (Amer.), 2nd ed. 236.
(*c*) *Blenkinsopp* v. *Blenkinsopp*, 1 D. M. & G. 495–500.

he held himself as executor, has been held not within the statute (*d*).

Case in Ireland; estate tail resettled on self and issue.

A settlement by a tenant in tail, by which he opened and resettled his estate on himself for life, with remainders over, has been held (*e*) not to be within the statute, because "the property was in his dominion either to leave it as he got it, or to convert it, or to convert it so as to become absolutely his own; but leaving it as it was, the creditor could have nothing except during his life;" and it was said that if he had disentailed the property by one deed and then settled it by another, yet even then it would be difficult to say he could not have removed it from his creditors, the whole being one transaction (*f*). As in this case the debtor was bankrupt, so that his assignees would have been able to sell the estate tail (*g*) if it had not been for the settlement complained of, it must be allowed that the decision is hardly satisfactory, but it seems to be the only authority on the point.

Contingent reversionary interests given as part of consideration on sale of business.

A contingent reversionary interest is within the statute, and so is the settlement of an annuity purchased with the proceeds of the sale of a bankrupt's stock in trade, when the settlor was in insolvent circumstances (*h*)

Debts.

The forgiveness by a debtor of a debt due *to* him, would, of course, be within the statute (*i*); or entering into a covenent not to enforce a bond (*k*); for debts due to a man are now available to his creditors (*l*), and within the statute.

Lease holds.

Leaseholds are within the statute, and an asssignment

(*d*) *Ridler* v. *Punter*, Cro. Eliz. 291.

(*e*) *Clements* v. *Eccles*, 11 Ir. Eq. Rep. 229.

(*f*) Ibid. 238–9.

(*g*) The Irish bankrupt law was then regulated by 12 & 13 Vict. c. 107; see s. 78, re-enacting 6 & 7 Will. 4, c. 4, ss. 78, 91, &c., as to property vesting in assignees, and their powers. And by the English law they then had the same power by 12 & 13 Vict. c. 106, s. 208, incorporating the provisions of the Fines and Recoveries Act. See 1 Griffith & Holmes, 261.

(*h*) Ante, p. 22; *French* v. *French*, 6 D. M. & G. 95 followed by *Neale v. Day*, 28 L. J. Ch. 45. See *Barrack v. McCulloch*, 3 K. & J. 110, 117–8.

(*i*) *Sibthorp* v. *Moxom*, 3 Atk. 581; *Henderson* v. *Lloyd*, 3 F. & F. 7.

(*k*) *Slack v. Tolson*, 1 Russ. 553.

(*l*) See Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 60 et. seq.

of leaseholds for no consideration is not within the exception in *the statute by the mere fact that [* 25] the grantee becomes liable for the rent (*m*).

Officers' pay not within statute.

The pay or half-pay of officers is not assignable, nor is an office of trust; and therefore no question with regard to them can arise under the statute (*n*); for nothing can be taken in execution which is not assignable (*o*).

Wife's separate property when liable to her debts *before* marriage.

Before the Married Women's Property Acts of 1870, 1874, and 1882, the wife's separate property not subject to a restraint on anticipation became under certain circumstances liable to the payment of her debts contracted before marriage. By the common law, indeed, the husband was supposed to take all the wife's property (under certain restrictions as to real property), and for this reason he was liable for her debts (*p*)—they became his—during coverture (*q*); and this principle applied whether the wife had or had not property at the time of her marriage (*r*). But the husband and wife must have been sued jointly for the wife's debt (*s*), and if no action was brought during the coverture, and the wife survived, she remained just as liable for her debts as she was before the marriage; but if an action was brought, and judgment recovered, against husband and wife during the coverture, and the husband became bankrupt, and obtained his discharge, the liability of the husband and of the wife for the wife's debt was gone at law, although the creditor thus lost the chance he would have had of recovering against the wife after the husband's death (*t*).

*But the reason of this has been broken in [* 26]

(*m*) *In re Ridler*, 22 Ch. D., per Cotton, L.J., 82.

(*n*) *Stone* v. *Lidderdale*, 2 Anstr. 533; *M'Carthy* v. *Goold*, 1 B. & B. 390; *Barwick* v. *Reade*, 1 H. Bl. 627, and cases in note; see also 1 & 2 Vict. c. 110, ss. 55, 56. But see the Bankruptcy Acts, 1869 (32 & 33 Vict. c. 71), s. 89, and 1883 (46 & 47 Vict. c. 52), s. 53, under which part of an officer's pay may be appropriated to paying his debts in his bankruptcy.

(*o*) Bing. on Executions, 104.

(*p*) *M'William's Case*, 1 Sch. & Lef. 169; *Chubb* v. *Stretch*, L. R. 9 Eq. 555.

(*q*) *Lockwood* v. *Salter*, 5 B. & Ad. 309. But see now the Married Women's Property Act, 1870, s. 12; the Amendment Act of 1874, ss. 1, 2, 5; and the Married Women's Property Act, 1882, ss. 14, 15.

(*r*) *Bell* v. *Stocker*, 10 Q. B. D. at p. 130.

(*s*) *Mitchinson* v. *Hewson*, 7 T. R. 348.

(*t*) *Miles* v. *Williams*, 1 P. Wms. 249; *Lockwood* v. *Salter*, 5 B. & Ad. 303, 309; *Woodman* v. *Chapman*, 1 Camp. 188.

Separate property liable if husband unable to pay;

upon by the jurisdiction which the Court of Chancery has exercised in protecting property of a wife settled to her separate use. Such property did not become the husband's by the marriage, and even at law, the principle that such property was liable to her debts, if the

or bankrupt.

husband could not pay them (*u*), was recognized (*v*). In equity, though the wife was not and is not personally liable (*w*), after the husband's bankruptcy, a creditor of hers, even if he has proved his debt in the bankruptcy, could obtain satisfaction out of the wife's separate property (*x*). As every settlement which takes

Settlement to avoid that liability.

property out of the reach of creditors of the settlor savours of fraud, a case may be put where a woman being in debt might have made over all her effects in trust, and then have married a bankrupt, and, by that, discharged all her debts, and yet preserved her estate; and that would be a fraudulent conveyance as against creditors quoad so much of the estate as would satisfy their debts, and for that they might have remedy (*y*).

Biscoe v. *Kennedy*.

In the old case of *Biscoe* v. *Kennedy* (*z*) personal estate was, on the marriage of B., settled to her separate use. She was indebted by bond at the time of the marriage; the creditor filed his bill to have this trust property applied to pay his debt, and the bill was dismissed because the creditor had not done his best to get the money from the husband, but afterwards, the husband having absconded and having been outlawed, the creditor filed another bill to make her separate estate liable, contending that the deed was fraudulent against him, and it was decreed in his favour.

(*u*) *Biscoe* v. *Kennedy*, 1 Bro. C. C. 17, n.; cited in *Chubb* v. *Stretch*, L. R. 9 Eq. 561.

(*v*) *Sparkes* v. *Bell*, 8 B. & C. 1; *Lockwood* v. *Salter*, 5 B. & Ad. 303, 312; *Chubb* v. *Stretch*, L. R. 9 Eq. 555, 561.

(*w*) *Hulme* v. *Tenant*, 1 Bro. C. C. 20, and note 3; *Francis* v. *Wigzell*, 1 Mad. 258–264; *Atwood* v. *Chichester*, 3 Q. B. D. 722. A married woman cannot now be made personally liable as for a debt, although final judgment can be signed against her under the Married Women's Property Act, 1882, s. 1 (2). See *Brown* v. *Morgan*, 12 L. R. Ir. 122, and *Perks* v. *Mylrea*, W.N.(1884) 64, overruling *Moore* v. *Mulligan*, W.N. (1884) 34; *Gloucestershire Banking Co.* v. *Phillips*, 12 Q. B. D. 533; *Bursill* v. *Tanner*, 13 Q. B. D. 691; *Meager* v. *Pellew*, 14 Q. B. D. 973.

(*x*) *Chubb* v. *Stretch*, L. R. 9 Eq. 555; infra.

(*y*) Per Parker, C.J. (Lord Macclesfield), in *Miles* v. *Williams*, 1 P. Wms. 249, 257–8.

(*z*) Note to *Hulme* v. *Tenant*, 1 Bro. C. C. 17; 1 Wh. & Tu. L. C. 6th ed. 536; 2 Rop. Husb. & W. 2nd ed. 240. See the decree in *Chubb* v. *Stretch*, L. R. 9 Eq. 562.

Chubb v. *Stretch*.

* In *Chubb* v. *Stretch*, (*a*) a widow, being [* 27] indebted, married Mr. S., and on their marriage a small freehold estate of hers and certain sums of money were vested in a trustee for her separate use during the joint lives of herself and her husband; the wife's creditors in 1868 commenced an action against the husband and wife, but before judgment could be obtained Mr. S. was adjudged bankrupt; the creditors proved in the bankruptcy for the amount of their claim, but there were no assets, and the bankrupt was discharged. The creditors then filed their bill in Chancery against Mr. and Mrs. S. and the trustee of the settlement, for the purpose of having the separate interest of Mrs. S. under the settlement applied in payment of their debt. Sir R. Malins, V. C., held that debts incurred by a married woman might be enforced against her separate estate, and that though personally discharged at law (*b*) her property remained liable; and that the creditors were entitled to have their debt paid out of her separate interest under the settlement.

Married woman's liability for her ante-nuptial debts under the Act of 1870.

The married Women's Property Act, 1870, (*c*), extended the rights in equity of the ante-nuptial creditors of a woman married on or after the 9th August, 1870, to *all* her separate property; and expressly released the husband from any liability in respect thereof. But, by this Act, a woman, by merely marrying without any settlement, could defeat the claims of such creditors altogether; as her property by the act of marriage became her husband's.

Sanger v. *Sanger*.

In *Sanger* v. *Sanger* (*d*) a woman remarried, in 1871, without a settlement, who had incurred a debt before her first marriage. She was entitled to an annuity for her separate use, without power of anticipation, under her first husband's will, which was being administered by the Court, and a fund had been set apart in Court to meet this annuity. Judgment had been entered up against her after her marriage for this debt, and subsequently an order had been obtained charging the fund with the debt, and interest. On * an [* 28] application for a stop order, it was held that section 12 extended to property subject to a restraint on anticipa-

(*a*) L. R. 9 Eq. 555.
(*b*) *Miles* v. *Williams*, 1 P. Wms. 249; *Atwood* v. *Chichester*, 3 Q. B. D. 722; *Aylett* v. *Ashton*, 1 My. & Cr. 111.
(*c*) 33 & 34 Vict. c. 93, s. 12.
(*d*) L. R. 11 Eq. 470.

tion, and that the charging order was a good incumbrance.

London and Provincial Bank v. *Bogle*.

So in *London and Provincial Bank* v. *Bogle* (*e*) a woman then in debt settled on her marriage, in 1875, *all* her property to her separate use without power of anticipation. The creditors, after having obtained judgment against her, brought an action against her, her husband, and the trustees of her settlement, for payment of the debt and costs. Bacon, V. C., said: "This is clearly a debt contracted by the wife before her marriage within the words of section 12 of the Married Women's Property Act, 1870, and therefore a debt for which her separate estate is liable. What is her separate estate? Clearly it is her right to receive the income of her settled property. There must be a declaration that the plaintiffs are entitled to recover against the separate estate included in the settlement, notwithstanding the restraint on anticipation, the amount of their judgment debt and costs."

Under the Act of 1874.

The Married Women's Property Act Amendment Act, 1874, which applied to all women married on or after July 30, 1874, left untouched the liability of the wife's separate property for her ante-nuptial debts imposed by the Act of 1870, but created a liability of the husband for those debts, limited to the extent of any assets he had or might have received through or in right of his wife (*f*). So, under the Act of 1870, the separate property of a married woman not subject to the restraint on anticipation could be taken in execution to satisfy the claims of her ante-nuptial creditors (*g*).

Under the Act of 1882.

Under the Married Woman's Property Act, 1882 (*h*), a woman married on or after January 1, 1883, after her marriage continues to be liable in respect and to the extent of her separate property for all her ante-nuptial debts, as if she were still unmarried. For, it should be observed that by this Act (*i*) the term *separate* [* 29] property * acquired an enlarged meaning. It

(*e*) 7 Ch. D. 773; and see *Williams* v. *Mercier*, 9 Q. B. D. 337, S. C. 10 App. Cas. 1.

(*f*) 37 & 38 Vict. c. 50, ss. 1, 2, 5.

(*g*) *Ex parte Jones*, 12 Ch. D. 484; *Robinson* v. *Pickering*, 16 Ch. D. 660; *Williams* v. *Mercier*, 9 Q. B. D. 337, S. C. 10 App. Cas. 1.

(*h*) 45 & 46 Vict. c. 75, s. 13.

(*i*) 45 & 46 Vict. c. 75 s. 2.

now means, with reference to a woman who has married since the date of the operation of the Act, *all* property, real or personal, which belongs to her at her marriage, which she acquires or which devolves on her afterwards (*k*).

Settlements by women before and after marriage, when void against ante-nuptial creditors.

As by the husband's death or bankruptcy, or by the dissolution of the marriage (*l*), the wife's sole liability revived, so that her separate property became liable to satisfy her debts, it seemed to follow that any voluntary dealing with her separate property by a woman, so as to put it out of the reach of her creditors (*m*), would be void within the statute of Elizabeth against her ante-nuptial creditors.

The same might have been said of any voluntary alienation by her, either before or after marriage, of property not settled to her separate use; inasmuch as, but for such alienation, the property would have gone to the husband, and he could have been compelled to satisfy the debts. Such a settlement, however, would probably have been made on the valuable consideration of marriage.

Equity of settlement subject to ante-nuptial debts.

It followed from this that a wife's equity to a settlement which only attached to property which her husband took in right of her (*n*) would not generally be enforced against her creditors before her marriage; at least not if her husband was bankrupt, and her debts, contracted before her marriage, exceeded the property on which her equity attached (*o*).

This, of course, cannot be the case with regard to any woman who has married on or after January 1, 1883, as by the Married Women's Property Act, 1882, s. 2, she holds *all* her property as her separate property independently of her husband; and therefore the question of voluntary alienation of property by her, not set-

(*k*) *Mander* v. *Harris*, 24 Ch. D. at pp. 229–230.

(*l*) *Capel* v. *Powell*, 17 C. B. (N.S.) 743; Roll. Ab. 337; *Chubb* v. *Stretch*, L. R. 9 Eq. 555, *Bell* v. *Stocker*, 10 Q. B. D. 128.

(*m*) Of course a gift to her husband would not have had that effect; but see now the Married Women's Property Act, 1882, ss. 1 (1) and 10.

(*n*) *Knight* v. *Knight*, L. R. 18 Eq. 490; and see *Murray* v. *Lord Elibank*, 10 Ves. 84; 1 Wh. & Tu. L. C. 6th ed. 493 et seq.; post, p. 296 et seq.

(*o*) *Bonner* v. *Bonner*, 17 Beav. 86; *Barnard* v. *Ford*, L. R. 4 Ch. 247.

tled to her separate use, cannot arise. Neither can this question arise as to the property acquired on or after [* 30] that day by any woman who * has married before January 1, 1883 (*o*). The husband, moreover, is by the Act of 1874 only liable to the extent of the assets he has or might have received through or in right of his wife (*p*), and by the Act of 1882 to the extent only of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife (*q*).

Married Women's Property Act, 1882.

The Married Women's Property Act, 1882 (*r*), provides that "No restraint against anticipation contained in any settlement, or agreement for a settlement, of a *woman's own property, to be made or entered into by herself*, shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement, or agreement for a settlement, made or entered into by a man would have against his creditors."

This section, which is not retrospective (*s*), applies to any ante-nuptial or post-nuptial settlement made or entered into by any woman on or after January 1, 1883 (the date of the operation of the Act), but only as regards the woman's *own* property, and also only if made or entered into *by her*. A settlement, therefore, made *on* her by a stranger will still be good against her ante-nuptial debts (*t*). So it seems now to be immaterial whether all the parties interested under the settlement are or are not ascertained, if only the settlement be by a woman of her own property; an ante-nuptial creditor will be able to resort to the property to satisfy his claim by virtue of this section (*u*).

Settlement by married woman under Act of 1882, when void against her creditors.

This section gives to a settlement made by a woman of her own property the same validity against her creditors as a similar settlement made by a man; it will be valid or invalid under precisely the same circumstance,

(*o*) 45 & 46 Vict. c. 75, s. 5.
(*p*) See above, p. 28.
(*q*) 45 & 46 Vict. c. 75, s. 14.
(*r*) 45 & 46 Vict. c. 75, s. 19.
(*s*) *Smith* v. *Whitlock*, 55 L. J. (N.S.) Q. B. 286.
(*t*) But see *Sanger* v. *Sanger*, L. R. 11 Eq. 470; above, pp. 27–28.
(*u*) *Paul* v. *Paul*, 20 Ch. D. 742; *Hodges* v. *Hodges*, 20 Ch. D. 749.

and is equally now within reach of her creditors. Although execution cannot issue against a married woman's property generally, but is limited to her *separate property to which a restraint on an- [*31] ticipation is not annexed (*v*), yet where that restraint on anticipation is imposed by a settlement, or agreement for a settlement, made *by her* of *her own* property, execution may issue against that property (*w*).

Includes property subject to *general* power of appointment by deed.

The statute 13 Eliz. c. 5, extends to all kinds of property which may be the subject of a settlement, including, of course, a *general* power of appointment by deed, and indeed any power which is not a bare, naked power, but an ownership, so that the alienation of it would be prejudicial to creditors (*x*).

But a *general* power of appointment by deed exercisable by a married woman is not her separate property (*y*), and therefore is not within the statute; nor is property subject to a *particular* power of appointment, as among certain persons; for, as the debtor cannot appoint to himself, his creditors cannot claim the benefit of it (*z*).

What *kinds* of settlement may be set aside.

As to the *kind* of settlement or alienation which may be set aside as void under the statute, the 1st section enumerates "feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, and hereditaments, goods and chattels, or any of them, or of any lease, rent, common, or other profit or charge out of the same, . . . by writing or otherwise, and all and every bond, suit, judgment, and execution." The jurisdiction of the Court, however, is not to be strictly confined by the words of the statute.

The following *kinds* of settlements have been held to be within the meaning of the statute. A voluntary set-

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(*v*) *Gloucestershire Banking Co.* v. *Phillips*, 12 Q. B. D. 532; *Bursill* v. *Tanner*, 13 Q. B. D. 691.

(*w*) *Bursill* v. *Tanner*, 13 Q. B. D. 691.

(*x*) *White* v. *Sansom*, 3 Atk. 411; *Troughton* v. *Troughton*, 3 Atk. 656; *Townshend* v. *Windham*, 2 Ves. 1, 11; *Whittington* v. *Jennings*, 6 Sim. 493; *Bainton* v. *Ward*, 2 Atk. 172; *Stilwell* v. *Mellersh*, 20 L. J. Ch. 356, 360; *Thompson* v. *Towne*, Prec. Ch. 52; *Lassells* v. *Cornwallis*, Prec. Ch. 232.

(*y*) *In re Armstrong*, 17 Q. B. D. 167, S. C. *Ex parte Gilchrist*, 17 Q. B. D. 521.

(*z*) See *Townshend* v. *Windham*, 2 Ves. 9; and see Bump. Fr. Conv. (Amer.), 2nd ed. 241.

Settlements within the statute. Voluntary settlements.

tlement (*z*), a post-nuptial settlement (*a*), a voluntary assignment (*b*), a voluntary assignment after the commission of felony, but before conviction (*c*), a voluntary settlement reserving to the settlor a life estate determinable on bankruptcy (*d*), a voluntary settlement [* 32] which the settlor * has power to alter or revoke (*e*), and probably if it can be revoked with the consent of a person nominated by and "at the devotion of" the settlor (*f*), but not if that consent is of persons not under the control of the settlor (*g*), and a voluntary settlement by a guarantor of substantially all his property (*h*). It would seem that a voluntary settlement of an equity of redemption when the mortgagor covenants to pay the interest on the mortgage, and to pay off the principal, is within the statute (*i*).

Settlements for value.

A settlement, though made for valuable consideration, may be affected by mala fides, but those who undertake to impeach for mala fides such settlement, have a task of great difficulty to discharge (*k*). The mere fact that a bonâ fide creditor may be defeated is not of itself sufficient to set aside a deed founded on valuable consideration (*l*). So an ante-nuptial settlement has been held fraudulent and void (*m*), an assignment of a share in a partnership as against joint creditors (*n*), a sale of property by an insolvent trader (*o*), a sale by a father of all his property to his children, although in itself a fair family distribution (*p*), a separation deed (*q*), money paid for redemption of the land-tax of land

(*z*) *Holmes* v. *Penney*, 3 K. & J. 99.
(*a*) *Taylor* v. *Coenen*, 1 Ch. D. 636.
(*b*) *Norcutt* v. *Dodd*, Cr. & P. 100; *Stokoe* v. *Cowan*, 29 Beav. 637.
(*c*) *Re Saunders*, 4 Giff. 179.
(*d*) *In re Pearson*, 3 Ch. D. 807.
(*e*) *Tarbuck* v. *Marbury*, 2 Vern. 510; *Smith* v. *Hurst*, 10 Hare, 44.
(*f*) See 3 Rep. 826; Dav. Prec. 3rd ed. vol. 3, 679.
(*g*) See *Buller* v. *Waterhouse*, 2 Jo. 94, decided on 27 Eliz. c. 4; Sug. V. & P. 14th ed. 721.
(*h*) *In re Ridler*, 22 Ch. D. 74.
(*i*) *Ex parte Huxtable*, 2 Ch. D. 54.
(*k*) *Harman* v. *Richards*, 10 Hare, per Turner, L.J., 89.
(*l*) *In re Johnson*, 20 Ch. D. at p. 396.
(*m*) *Bulmer* v. *Hunter*, L. R. 8 Eq. 46.
(*n*) *Ex parte Mayow*, 11 Jur. (N.S.) 433.
(*o*) *French* v. *French*, 6 De G. M. & G. 95; *Wakefield* v. *Gibbon*, 3 Jur. (N.S.) 356.
(*p*) *Cornish* v. *Clark*, L. R. 14 Eq. 184; but see *In re Johnson*, 20 Ch. D. 389, S. C. 51 L. J. (N.S.) Ch. 503; *Ex parte Eyre*, 44 L. T. (N.S.) 922.
(*q*) *Clough* v. *Lambert*, 10 Sim. 174; *Frampton* v. *Frampton*, 4 Beav. 257.

settled by the settlor or himself and others (*r*), a trust to carry on a business for the benefit of creditors, if there be a resulting trust in favour of the debtor (*s*), but not if the trust be primarily for the purpose of selling the business (*t*). An assignment for the general benefit of creditors is not of itself within the statute (*u*), but it is if made for the purpose of defeating an expected judgment (*v*).

* The exercise of a general power of appoint- [* 33] ment by deed, either over land (*w*), or a sum of money (*x*), may be fraudulent and void under the statute, but where a man has only a limited or exclusive power of appointment of course it is different. He never had any interest in the property himself which could have been available to a creditor, or by which he could have obtained credit (*y*). Powers of appointment.

A disposition of property is equally within the statute, whether it is by voluntary settlement or by gift, whether it is in anticipation of death or bankruptcy, or by the free will of the donor, or whether it is at the instance of the donees. The defect of such disposition is that it removes the debtor's property out of the reach of all his creditors (*z*). Cause of the disposition of the property by the debtor immaterial.

So in whatever way the disposition of property be effected, it will be held within the statute, which is general, for the suppression of fraud (*a*), and a man will not be allowed to do in one way that which he cannot do in another (*b*); so a voluntary post-obit bond (*c*) and an advancement have been held void (*d*). A judgment (*f*), Judgments.

(*r*) *Emly* v. *Guy*, 3 Mer. 702.
(*s*) *Owen* v. *Body*, 5 A. & E. 28; *Spencer* v. *Slater*, 4 Q. B. D. 13.
(*t*) *Boldero* v. *London and Westminster Loan and Discount Co.*, 5 Ex. D. 47.
(*u*) *Pickstock* v. *Lyster*, 3 Man. & Sel. 371.
(*v*) *Reese River Silver Mining Co.* v. *Atwell*, L. R. 7 Eq. 347.
(*w*) *Townshend* v. *Windham*, 2 Ves. 1.
(*x*) *Pack* v. *Bathurst*, 3 Atk. 269.
(*y*) See *Sims* v. *Thomas*, 12 Ad. & E. 536; *Hockley* v. *Mawbey*, 1 Ves. Jun. 143, 150; ante, p. 31.
(*z*) *Cornish* v. *Clark*, L. R. 14 Eq. 189. The same is the law in America: see Bump. Fr. Conv. (Amer.), 2nd ed. 235.
(*a*) 3 Co. 82 a; see also Lord Mansfield in *Cadogan* v. *Kennett*, Cowp. 434, and ante, p 4.
(*b*) *Fitzer* v. *Fitzer*, 2 Atk. 511.
(*c*) *Adames* v. *Hallett*, L. R. 6 Eq. 468.
(*d*) *Christy* v. *Courtenay*, 1 Beav. 96; *Barrack* v. *M'Culloch*, 3 Kay & J. 110.
(*f*) *Clavey* v. *Hayley*, 2 Cowp. 427.

therefore, or a confession of judgment, for a debt really due (*g*) and à fortiori where no real debt (*h*); a fraudulent judgment and execution (*i*); entering into a covenant not to enforce a bond (*k*); or a transfer or forgiveness of debts due to him by a person indebted (*l*), are within the statute; for as debts due to a debtor can now be made available for payment of his debts (*m*), the release or alienation of them is an injury to his creditors.

Release of debts.

Fraudulent outlawry.

But any process by which an alienation of property liable to debts is effected will be within the statute; so [*34] that where judgment was *given against one in debt, and he suffered himself to be outlawed in felony to the intent to defraud his creditors, and afterwards purchased a pardon and had restitution, the creditor was allowed to sue out execution on account of the manifest fraud (*n*); and by the common law such circuitous evasions of justice were not allowed to take effect (*o*).

Forfeiture.

So where tenant for life, being in debt, colluded with the remainderman and committed a forfeiture, Sir Matthew Hale was of opinion that creditors were entitled to avoid this as much as any fraudulent conveyance (*p*).

Family settlements not generally within statute.

Settlements which are honest family arrangements are regarded with favour by Courts of Equity (*q*), and are not within the statute, although not founded on actual valuable consideration, unless the rights of existing creditors are thereby *directly* interfered with (*r*). Such settlements, if founded on an inadequate consideration, will not therefore be held void (*s*); for the Court, in such a case, does not regard the inadequacy of consideration as a badge of fraud (*t*).

(*g*) *Holbird* v. *Anderson*, 5 T. R. 235; *Meux* v. *Howell*, 4 East 1.
(*h*) *Billiter* v. *Young*, 6 E. & B. 1.
(*i*) *Imray* v. *Magnay*, 11 M. & W. 267; *Hunt* v. *Hooper*, 12 M. & W. 664; and see post, pp. 171 et seq.
(*k*) *Slack* v. *Tolson*, 1 Russ. 553.
(*l*) *Sibthorp* v. *Moxom*, 3 Atk. 581; *Henderson* v. *Lloyd*, 3 F. & F. 7; *Belcher* v. *Prittie*, 10 Bing. 408.
(*m*) Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 60 et seq.
(*n*) *Beverley's Case*, 2 Dyer, (Vail. ed.), 245 b, n.
(*o*) *Verney's Case*, 2 Dyer, 245 b.
(*p*) Anon. Vent. 275; Vin. Abr. tit. Fraud (F.), pl. 14.
(*q*) *Penhall* v. *Elwin*, 1 Sim. & G. 258, 269.
(*r*) *Penhall* v. *Elwin*, 1 Sm. & G. at p. 270.
(*s*) Post, pp. 270 et seq.
(*t*) *In re Johnson*, 20 Ch. D. 389, S. C. 51 L. J. (N.S.) Ch. 503; post, pp. 271, 272.

*CHAPTER II. [*35]

WHAT VOLUNTARY CONVEYANCES ARE VOID AS AGAINST EXISTING CREDITORS.

Circumstance *at the time* the deed is executed to be looked at.

In considering whether a conveyance is void under 13 Eliz. c. 5, all the circumstances *at the time* that the conveyance is made must be looked at, and not *subsequent* events, except such as must be taken to have been in the contemplation of the transferor at the time of transferring the property, and from which a fraudulent intention at that time may be gathered (*t*).

It is very important to keep this in mind, for on this principle, and on this principle alone can the cases be reconciled.

The subject, therefore, naturally divides itself into the following two heads.

What state of circumstances *at the time* of the transfer are fatal to the validity of a transfer?

What transfers are fraudulent against creditors, in which the fraudulent intention *at the time* of the transfer is shewn by *subsequent* acts or events which may in fact have been, or must, in law, be taken to have been, then in the transferor's contemplation? (*u*).

All voluntary conveyances by persons "indebted" void against creditors.

As to the first class of cases, it may be stated generally that all voluntary transfers of property by a person "indebted" according to Lord Hardwicke's meaning, as explained by subsequent cases, are void against creditors. The mere fact of a man "indebted" giving away part of his estate is, by presumption and construction of law, a fraudulent act.

(*t*) Ante, p. 15, and see *Mackay* v. *Douglas*, L. R. 14 Eq. at p. 120; *Ex parte Russell*, 19 Ch. D. 588; *In re Johnson*, 20 Ch. D. 389, S. C. 51 L. J. (N.S.) Ch. 503; *In re Maddever*, 27 Ch. D. 523; *Ex parte Mercer*, 17 Q. B. D. 290.

(*u*) Post ch. iii.; and see pp. 51-45.

The principle, as stated by Lord Hatherley, L. C., in [* 36] *Freeman* v. * *Pope* (*u*), on which the statute of 13 Eliz. c. 5, proceeds, is this that persons must be just before they are generous, and that debts must be paid before gifts can be made.

The reason of the rule.

For where a man indebted gives all his goods to a son or cousin in consideration of natural affection, lest others should lose their debts, which are things of value, the intention of the Act was that the consideration should be valuable; for equity requires that that gift which defeats others should be made on as high and good consideration as the things which are thereby defeated are; and it is to be presumed that the father, if he had not been indebted, would not have dispossessed himself of all his goods, and subjected himself to his cradle; and therefore it shall be intended that it was made to defeat creditors (*v*).

Settlements by persons not "indebted" and not meaning a fraud good though voluntry.

But, on the other hand, a voluntary conveyance or settlement by a person *not* indebted, and *not* meaning a fraud, is clearly good against future creditors. The law is perfectly settled that if a man is solvent at the time and after the time of taking away the property which is put into the settlement he remains solvent, and does not at the time contemplate doing anything which could lead to insolvency, that settlement will be good (*w*). Fraud, however, of course vitiates the transaction—that is to say, where there is an express intent to defraud future creditors it is bad (*x*); but a settlement not fraudulent, by a party not indebted, is valid, though voluntary (*y*), and cannot be shaken by subsequent debts.

Agreement when not indebted, performed when in debt.

It has never been decided whether a settlement by a man indebted, in pursuance of an agreement entered into when he was not indebted, would be good against his creditors. If it were a binding agreement, which

(*u*) L. R. 5 Ch. 540; and see *Ex parte Williams*, L. R. 10 Eq., per Bacon, C.J.B., 61.

(*v*) *Twyne's Case*, 3 Rep. 81 b.

(*w*) *Mackay* v. *Douglas*, L. R. 14 Eq., per Malins, V.C. 121; post, pp. 45, 53.

(*x*) *Mackay* v. *Douglas*, L. R. 14 Eq. 106; *Ex parte Russell*, 19 Ch. D. 588. The same is the law in Upper Canada: see *Bank of British North America* v. *Rattenburg*, 7 Chy. 383.

(*y*) Sir T. Plumer, in *Battersbee* v. *Farrington*, 1 Sw. 106; Hardwicke, L.C., in *Russel* v. *Hammond*, 1 Atk. 13; *Townshend, Lord*, v. *Windham*, 2 Ves. 11, 12.

could be enforced against him, or if there was an actual completed trust, such a settlement would, *doubtless, stand; but it can hardly be thought that the performance, when indebted, of a mere voluntary agreement made when in good circumstances, and which he could not be compelled to carry into effect, would be valid (*z*). [*37]

Two requisites are necessary for perfecting this constructive or presumptive fraud under the statute! first, the conveyance must be voluntary; secondly, the conveyer must be indebted.

The question what conveyances are voluntary will be hereafter discussed (*a*).

What is indebtedness?

The subject of this chapter is, the nature of the indebtedness which vitiates such a transaction. In *Townshend* v. *Windham* (*b*) a testator had made a voluntary appointment in favour of his daughter, to take effect after his death, and Lord Hardwicke said: "The testator being 'indebted' at the time of the appointment, it was void against his creditors;" and in *Russel* v. *Hammond* (*c*) the same learned judge observed, that the only voluntary conveyances which are not fraudulent under this statute are those "where the persons making them are not indebted at the time;" and in *Walker* v. *Burrows* (*d*) he spoke of indebtedness at the time, or soon after, as a circumstance from which a fraudulent intention might be collected.

What is meant by the word "indebted" as used by Lord Hardwicke, &c.

Lord Hardwicke, however, spoke of "indebtedness" (*e*) simply, without any definition of its precise meaning, and several varying decisions have resulted from different interpretations of his words. Sir R. P. Arden (*f*) thought the debtor must be in insolvent circumstances, and in this he was followed by Lord St. Leonards (*g*); while other opinions are recorded which go quite as far in the opposite direction, laying down that the existence of almost any debt at the time of the

(*z*) See *Houghton* v. *Tate*, 3 Y. & J. 486; and see post, pt. v. ch. i.
(*a*) Post, pp. 248 et seq. (*b*) 2 Ves. 1, 10.
(*c*) 1 Atk. 13. (*d*) 1 Atk. 94.
(*e*) The word is used in precisely the same sense in *Worsley* v. *Demattos*, 1 Burr. 468.
(*f*) In *Lush* v. *Wilkinson*, 5 Ves. 384. See also *Shears* v. *Rogers*, 3 B. & Ad. 362; *Norcutt* v. *Dodd*, Cr. & P. 100; *Skarf* v. *Soulby*, 1 M. & G. 364.
(*g*) *Martyn* v. *McNamara*, 4 D. & War. 427.

[* 38] transfer, and remaining unsatisfied, is * enough to avoid the transfer (*h*). But, as Lord Cottenham said (*i*) the word "indebted," as used by Lord Hardwicke in these cases, cannot be considered as meaning only that the settlor owed *some* debts. It must be remembered that the statute is couched in very general terms, and makes void all conveyances, made "to the end, purpose, and *intent* to delay, hinder, or defraud creditors," not restricting the operation to any particular state of circumstances (*k*); and therefore the question is never, whether there is any one circumstance which has in other cases been looked upon as an argument against the deed (*l*), but whether, having regard to *all* the facts of the case, it comes within the purview of the statute, and was made to defraud and delay creditors by placing the property out of their reach (*m*).

If settlor owes debts, and *necessary* result of settlement to defeat existing creditors, Court infers fraudulent intention.

In the absence of any such direct proof of intention, if a person *owing debts* makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement that some creditors must remain unpaid, there would be such an inference of a fraudulent intention as to bring the case within the statute (*n*), while the mere fact that the settlor is in embarrassed circumstances is not of itself a ground from which to infer a fraudulent intention, if the property left out of settlement is ample to pay all debts then owing (*o*).

Sale for full value.

But where a debtor sells property for an adequate consideration, no one is injured (*p*), for his estate is

(*h*) *Porter* v. *Boyle*, 3 Law Rec. 181, 365; *Spirett* v. *Willows*, 3 D. J. & S. 293; *Freeman* v. *Pope*, L. R. 5 Ch. 538. And see post, p. 46 et seq.

(*i*) In *Skarf* v. *Soulby*, 1 Mac. & G. 374-5.

(*k*) See the preamble and operative part: Appendix No. 1.

(*l*) See *Clements* v. *Eccles*, 11 Ir. Eq. 229,237.

(*m*) *Richardson* v. *Smallwood*, Jac. 552; *Thompson* v. *Webster*, 4 Drew. at p. 632; *In re Johnson*, 20 Ch. D. 389, S. C. 51 L. J. (N.S.) Ch. 503; *Ex parte Chaplin*, 26 Ch. D. 319; *Ex parte Mercer*, 17 Q. B. D. 290.

(*n*) *Freeman* v. *Pope*, L. R. 5 Ch. 538; *Taylor* v. *Cremer*, 1 Ch. D. 636; *Re Ridler*, 22 Ch. D., per Cotton, L. J., 82; *Ex parte Chaplin*, 26 Ch. D. 319; *In re Maddever*, 27 Ch. D. at p. 526; *Green* v. *Paterson*, 32 Ch. D., per Cotton, L. J., 105; post p. 50; but see *Ex parte Mercer*, 17 Q. B. D. 290; post, p. 74.

(*o*) *Kent* v. *Riley*, L. R. 14 Eq. 190; *White* v. *Witt*, 24 W. R. 727.

(*p*) *Copis* v. *Middleton*, 2 Mad. 430; and see *In re Johnson*, 20 Ch. D., per Fry, J., 397.

not dimnished by the *transaction ; he still has [*39] as large a fund as he before had for the satisfaction of claims, though in another form.

Townsend v. *Westacott.* Principle as to indebtedness.

Lord Langdale, in *Townsend* v. *Westacott* (*q*), put the rule as to what is indebtedness on its true principle, and has been repeatedly followed and approved. He said that the real and just construction of the statute does not warrant the proposition that the existence of *any* debt at the time of the execution of the deed was sufficient to induce the Court to set it aside ; because there is hardly any man who can avoid being indebted to some amount. He may intend to pay every debt as soon as it is contracted, and constantly use his best endeavours and have ample means to do so, and yet may be frequently, if not always, indebted in some small sum. There may be a withholding of claims contrary to his intention, by which he is kept indebted in spite of himself ; it would be idle to allege this as the least foundation for assuming fraud or any bad intention. That, on the other hand, it had been said that something amounting to insolvency (*r*) must be proved to set aside a voluntary conveyance ; that this too is inconsistent with the principle of the Act and with the judgments of the most eminent judges.

Insolvency not necessary. One debt not enough.

It is not, then, necessary to show actual insolvency, but the mere existence of a debt at the time of the settlement is not sufficient (*s*) ; so that proof of isolated debts is not what is required, except so far as they are material as evidence of an intention to defraud creditors, or as a foundation for an inquiry as to the state of the settlor's affairs. But if it can be shewn that the settlor, *at the time* he made the settlement, was indebted to the extent of insolvency, or that he became so by the abstraction of the property comprised in the settlement (*t*), this is enough to invalidate the settlement.

(*q*) 2 Beav. 340, 344. See Sir R. T. Kindersley's judgment to the same effect in *Thompson* v. *Webster*, 4 Drew. 628, 632.

(*r*) See infra.

(*s*) Cottenham, L.C., in *Skarf* v. *Soulby*, 1. H. & Tw. 426 ; and see *Kidney* v. *Coussmaker*, 12 Ves. 148. In *Twyne's Case*, 3 Co. 81 b, the expression is "greatly indebted ;" *Crossley* v. *Elworthy*, L. R. 12 Eq. 167 ; *Kent* v. *Riley*, L. R. 14 Eq. 190.

(*t*) *Smith* v. *Cherrill*, L. R. 4 Eq. 390, 395 ; *Hollamby* v. *Oldrieve*, W. N. (1866) 94 ; *Denison* v. *Tattersall*, 18 L. T. (N. S.) 303 ; *Freeman* v. *Pope*, L. R. 5 Ch. at p. 545 ; *Taylor* v. *Coenen*, 1 Ch. D. per Malins V. C., at pp. 641, 644 ; *Ex Parte Huxtable*, 2 Ch. D. 54 ; *Ex parte Russell*, 19 Ch. D. 588.

Presumption of fraudulent intention from embarrassed circumstances of settlor.

[* 40] * The extent of indebtedness fatal to a voluntary conveyance as against creditors may shortly be stated as that from which it must be presumed that the intention of the donor was, not to provide honestly for the donees and to put the property out of his own reach, but to do so at the expense of the just claims against him. But "the existence of property at the time of the settlement, not included in it, ample for the payment of debts then due, would negative the fraudulent intention" (*u*). This principle was clearly stated by Lord Hatherley, L.C., then Sir William Page Wood, V.C., in *Holmes* v. *Penney* (*v*). The mere fact, he said, of a settlement being voluntary is not enough to render it void as against creditors, but there must be unpaid debts which were existing at the time of making the settlement, and the settlor must have been at the time, not necessarily insolvent, but so largely indebted as to induce the Court to believe that the *intention* was to defraud persons who, at the time of the settlement, were creditors of the settlor (*w*).

Sir W. Fortescue, also, in *Taylor* v. *Jones* (*x*), said: "It is not material in the present case what the circumstances of the father were at the time of making this deed, any further than as an evidence to shew, if he was in indigent circumstances, that it was made with intent to commit a fraud."

So it was said by Sir G. M. Giffard, L.J., in *Freeman* v. *Pope* (*y*) that, if at the date of the settlement the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended by making the voluntary settlement to defeat and delay them (*z*).

And it is not now necessary to bring actual proof that the debtor had in his mind an intention to defeat, delay or defraud his creditors (*a*); for, if it appears

(*u*) *Skarf* v. *Soulby*, 16 Sim. 344, S. C. 1 Mac & G. 364; *Holloway* v. *Millard*, 1 Mad. 414; *Kent* v. *Riley*, L. R. 14 Eq. 190; *White* v. *Witt*, 24 W. R. 727.

(*v*) 3 K. & J. 90, 99.

(*w*) See also per Sir R. T. Kindersley in *Thompson* v. *Webster*, 4 Drew, 628, 632 et seq.; *Freeman* v. *Pope*, L. R. 9 Eq. 206, S. C. L. R. 5 Ch. 538.

(*x*) 2 Atk. 600–602.

(*y*) L. R. 5 Ch. at p. 545.

(*z*) See *Taylor* v. *Coenen*, 1 Ch. D. p. 641.

(*a*) See *Freeman* v. *Pope*, L. R. 5 Ch. 538, 540; *Crossley* v. *El-*

from *all* the circumstances of * the case that [* 41] the effect might be expected to be, and has in fact been, to do so, and that it is not within the proviso (*a*), the Court will attribute the fraudulent intention to the person executing the deed (*b*). It lies on the settlor to prove that he was not only solvent, but in a position which justified his making a voluntary settlement (*c*). Where the settlor is shewn to have been indebted, he must be taken to have known the state of his circumstances, whether he really did so or not; evidence that he did not will not rebut the presumptive fraud (*d*).

Whether in fact known to him or not.

Where the intention to defraud is manifest, and no other purpose appears, this is sufficient of itself to bring the case within the statute, and to override all other considerations whatever. So a settlement, by a man then owing no debts, and not in trade for eighteen years after, by which the first life estate was to the settlor, determinable on his bankruptcy, was held plainly fraudulent, because the intention of the settlor to put his property out of the reach of possible future creditors was evidenced by the trust in his own favour (*e*).

Fraud overrides all other considerations.

The cases (*f*) in which it has been said that it is necessary to shew that the voluntary settlor was *insolvent* may be, in a great measure, reconciled with these authorities by interpreting the word "insolvent" in the sense given to it in *Jackson* v. *Bowley* (*g*), where a voluntary assignment made by a testator in his lifetime was impeached by a creditor, in an action against the executor, on the ground of fraud, suggesting, as proof of fraud, that the testator was insolvent when he made

Insolvency means, not enough property left unsettled for payment of existing debts.

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worthy, L. R. 12 Eq. 158; *Mackay* v. *Douglas*, L. R. 14 Eq. at p. 120; *Cornish* v. *Clark*, L. R. 14 Eq. 184; *In re Ridler*, 22 Ch. D. 74; *In re Maddever*, 27 Ch. D., per North J., 526.

(*a*) 13 Eliz. c. 5, s. 6. See post, pp. 78 et seq.

(*b*) *Smith* v. *Cherrill*, L. R. 4 Eq. 390; *Cornish* v. *Clark*, L. R. 14 Eq. 184; *Spencer* v. *Slater*, 4 Q. B. D. 13; *In re Ridler*, 22 Ch. D., per Cotton, L. J., at p. 82; *Ex parte Chaplin*, 26 Ch. D. 319; *Green* v. *Paterson* 32 Ch. D., per Cotton, L.J. 105; ante, p. 38; but see *Ex parte Mercer*, 17 Q. B. D. 290.

(*c*) *Taylor* v. *Jones*, 2 Atk. 600, 603; *Denison* v. *Tattersall*, 18 L. T. (N.S.) 303; *Crossley* v. *Elworthy*, L. R. 12 Eq. at p. 164; *Mackay* v. *Douglas*, L. R. 14 Eq. at p. 119; *Taylor* v. *Coenen*, 1 Ch. D. 636.

(*d*) *Christy* v. *Courtenay*, 13 Beav. 96, 101.

(*e*) *Acraman* v. *Corbett*, 1 J. & H. 410, 423; *Taylor* v. *Coenen*, 1 Ch. D. 636; *In re Pearson*, 3 Ch. D. 867; and see *Learmouth* v. *Miller*, L. R. 2 H. L. Sc. 438.

(*f*) *Lush* v. *Wilkinson*, 5 Ves. 384; and other cases, ante, p. 37.

(*g*) Car. & M. 97.

the assignment. Mr. Justice Erskine, in summing up, said: "The question is, what is meant by insolvency? If by the act of assignment the party makes himself [* 42] *insolvent—that is, if the property left after the conveyance is not enough to pay his debts—that is insolvency sufficient for the purposes of the plaintiff in this action" (*h*).

This is the sense in which the term *insolvency* is now applied. To uphold a voluntary settlement, the settlor must, at the time of making it, have property enough left out of settlement to meet all his existing debts and liabilities (*i*), and such property must be then actually available assets for that purpose (*k*).

Test whether voluntary settlement void under Bankruptcy Act, 1869,

This was the test applied by the Bankruptcy Act, 1869, to all voluntary settlements made by *traders* more than two but within ten years before their bankruptcy.

If such a settlement was so impeached, the burden of proof lay on the settlor to shew that at the date of its execution he was able to pay all his debts in full without the aid of the property comprised in such settlement (*l*); that is to say, the settlor must have been able without such property to pay his debts out of actually available assets in the way which he proposed to pay them—that is, by continuing his business (*m*). This will be the test of capacity to pay debts under section 47 of the Act of 1883, cited below.

or under Bankruptcy Act, 1883.

The same test is applied by the Bankruptcy Act, 1883 (*n*), to all voluntary settlements, whether made by traders or non-traders; and in addition to uphold the settlement it must be shewn that the interest of the settlor in the property passed to the trustee of the settlement on the execution thereof.

The 47th section enacts that "any settlement of prop-

(*h*) See also per Lord Tenterden, in *Shears* v. *Rogers*, 3 B. & Ad. 362, 369; and *Clements* v. *Eccles*, 11 Ir. Eq. 237.

(*i*) *Freeman* v. *Pope*, L. R. 5 Ch. at p. 545; *Kent* v. *Riley*, L. R. 14 Eq. 190; *Taylor* v. *Coenen*, 1 Ch. D. 636; *Ex parte Huxtable*, 2 Ch. D. 54. As to how to estimate these, see post, pp. 57 et seq.

(*k*) *Ex parte Russell*, 19 Ch. D. 588; *In re Ridler*, 22 Ch. D. 74.

(*l*) *Ex parte Huxtable*, 2 Ch. D. 54; and see 32 & 33 Vict. c. 71, s. 91.

(*m*) *Ex parte Russell*, 19 Ch. D. 588.

(*n*) 46 & 47 Vict. c. 52, repealing 32 & 33 Vict. c. 71; see schedule 5.

erty not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor * becomes bankrupt within two years after [*43] the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor *was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement*, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof. Any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy."

Voluntary settlements within two years of bankruptcy absolutely void.

Within ten years voidable.

"'Settlement' shall, for the purposes of this section, include any conveyance or transfer of property."

Under section 49 of the Bankruptcy Act, 1883, an exception is made in favour of all and any dealings with the bankrupt for valuable consideration before the date of the receiving order by a person who has not then had notice of any available act of bankruptcy committed by the bankrupt before that time.

Saving of purchasers for value without notice.

In section 91 of the Act of 1869 the word *purchaser* was held to mean a buyer in the ordinary commercial sense, and not a purchaser in the legal sense, of the word; so that a trustee of a post-nuptial settlement of leaseholds though liable to pay the rent and perform the covenants in the lease, was not a purchaser for value within the section (*o*). The same meaning will apply in section 47 of the Act of 1883.

Purchaser, what under Bankruptcy Acts.

(*o*) *Ex parte Hillman*, 10 Ch. D. 622; *In re Ridler*, 22 Ch. D. 74.

Bankruptcy Acts retrospective.

It has been held (*p*) that the act of 1869, section 91, applied to settlements executed before as well as after the Act came into operation. The corresponding section of the Act of 1883 (*q*) will be also, it is conceived, deemed to be retrospective.

Covenant.

[* 44] * A covenant by a *trader*, in a settlement in consideration of marriage, to settle all his future acquired property, although he was then solvent, was held void within section 91 of the Act of 1869, on the ground that he could not, even for the consideration of marriage, withdraw from his creditors any future property he might acquire, if at the time his creditors had the right to be paid out of the property (*r*). A similar covenant by a non-trader will now be held void within section 47 of the act of 1883.

Cases section 47 will cover.

It will be observed that section 47 of the Bankruptcy Act of 1883 imposes a new condition, in requiring those who claim under the settlement to prove that the interest of the settler in the property passed to the trustee of the settlement on the execution thereof.

This meets cases where there is a *mere contract*, such, for instance, as in *Ex parte Bishop* (*s*), where a covenant is contained in a post-nuptial or other voluntary settlement to pay a sum of money or to transfer securities to trustees, and the same has not been actually paid or the securities transferred. It was held in *Ex parte Bishop* (*s*) that a covenant in an ante-nuptial settlement to pay a sum of money to the trustees was not within section 91, and that the section did not apply to what was a mere debt due from the settlor.

This condition will also apply to a class of cases, such as *In re Andrew's Trusts* (*t*), but where the settlement is voluntary. In that case a trader by ante-nuptial settlement covenanted to settle any property he should acquire under his father's will, by virtue either of a limited power of appointment therein, or in default of such appointment. It was held that as he then had an interest under the will, vested, but subject

(*p*) *Ex parte Dawson*, L. R. 19 Eq. 433.
(*q*) 46 & 47 Vict. c. 52 s. 47.
(*r*) *Ex parte Bolland*, L. R. 17 Eq. 115.
(*s*) L. R. 8 Ch. 718.
(*t*) 7 Ch. D. 635.

to be divested by an appointment, it was not within section 91.

A settlement, however, may still be voluntary, and, whether made by a trader or a non trader, if only it is not impeached within *ten* years of the date of its execution, will be a good settlement under the Bankruptcy Act; but under the statute of Elizabeth such settlement is liable to be impeached at any time, until the legal right of the creditor is barred by the Statutes of Limitation (*u*). When voluntary settlement good under Bankruptcy Acts, but not under statute of Elizabeth.

In cases of voluntary conveyances it mat- [45] ters not whether or not the donee had knowledge or notice of the fraudulent intent, for they are not within the exception in favour of bonâ fide purchases by persons "not having, at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud, or collusion" (*w*). Where the conveyance is *voluntary* it is the motive of the giver, not the knowledge of the acceptor, that is to weigh (*x*); for volunteers cannot be said to be injured by the gift to them being defeated; no loss is inflicted on them; they are only deprived of a gain to which others had a better right (*y*). But the Court will not allow a volunteer to be placed in a worse position than he was in before by the avoidance of a deed tainted with a fraud of which he was innocent (*z*). In voluntary conveyances only intent of *donor* is material.

A voluntary settlement may, however, be rendered void by the motives of the donees, even if the donor has no intention to defraud his creditors; but whether it is by the free will of the donor, or whether it is at the instance of the donees, such a settlement may be equally invalid having regard to the scope and object of the statute (*a*).

But it is proved by many cases that where the settlement was not executed under such circumstances as to Voluntary settlement, when good.

(*u*) Ante, p. 42; post, pp. 96, 184.
(*w*) 13 Eliz. c. 5, s. 6; post, pp. 78 et seq.
(*x*) Per Lord Northington in *Partridge* v. *Gopp*, 2 Amb. 596; *Mackay* v. *Douglas*, L. R. 14 Eq. 106. The same is the law in America. See Bump. Fr. Conv. (Amer.), 2nd ed. 263.
(*y*) So by the civil law: "Cui donatum est . . . . nec videtur affici injuriâ is qui ignoravit, cum lucrum extorqueatur non damnum infligatur." Dig. lib. 42, tit. 8, par. 6 sec. 11.
(*z*) *Tarleton* v. *Liddell*, 17 Q. B. 390, 4 De G. & Sm. 538.
(*a*) *Cornish* v. *Clark*, L. R. 14, Eq. 184.

shew that fraud was intended, or to induce the presumption of such intention, the mere fact of its being voluntary, and not even supported by meritorious considerations (*b*), will not make it void against creditors, either existing or future (*c*).

[* 46] *For, as Lord Hardwicke said in *Walker* v. *Burrows* (*d*), "Where a man has died indebted, who, in his lifetime, made a voluntary settlement, upon application to this Court to make it subject to his debts as real assets, the Court have always denied it, unless you shew he was indebted at the time the conveyance was executed;" words which clearly shew that Lord Hardwicke used the word "indebted" as meaning "embarrassed."

Justice of the opposite doctrine.

The distinction, says Fonblanque, is drawn from considerations too obvious to require illustration. For if a man "indebted" were allowed to divest himself of his property in favour of his wife or child, his creditors would be defrauded; but if a man not indebted and not meaning a fraud (*e*) could not make an effective settlement in favour of such objects, because by possibility he might afterwards become indebted, it would destroy those family provisions which are, under certain restrictions, a benefit to the public, as well as to the individual objects of them (*f*).

Spirett v. *Willows.*

This long-settled doctrine received a shock from the decision in the case of *Spirett* v. *Willows* (*g*). In that case the plaintiff sued as a creditor for a debt contracted before, but due very shortly after, the execution of a voluntary settlement made by a settlor then solvent. The

(*b*) *Holloway* v. *Millard*, 1 Mad. 414, 418; *Kent* v. *Riley*, L. R. 14 Eq. 190.

(*c*) *Townshend* v. *Windham*, 2 Ves. 1, 11, ante, p. 15; *Russell* v. *Hammond*, 1 Atk. 13; *Townsend* v. *Westacott*, 2 Beav. 340; *Skarf* v. *Soulby*, 1 Mac. & G. 364, 374–375; *Battersbee* v. *Farrington*, 1 Sw. 106; *Holloway* v. *Millard*, 1 Mad. 414–418; *Lilly* v. *Osborn*, 3 P. Wms. 298; *Martyn* v. *McNamara*, 4 D. & War. 427; *Thompson* v. *Webster*, 4 Drew. 628; *Exton* v. *Scott*, 6 Sim. 31; *French* v. *French*, 6 De G. M. & G. 95, 101; *Clements* v. *Eccles*, 11 Ir. Eq. 229 237; *Gugen* v. *Sampson*, 4 F. & F. 974; post, pp. 61 et seq.; contrà, *Porter* v. *Boyle*, 3 Law Rec. 181, 365; *Spirett* v. *Willows*, 3 D. J. & S. 293; *Kent* v. *Riley*, L. R. 14 Eq. ante, p. 36.

(*d*) 1 Atk. 94.

(*e*) *Holloway* v. *Millard*, 1 Mad. 414, 419; *Walker* v. *Burrows*, 1 Atk. 93–4; *Murphy* v. *Abrahams*, 15 Ir. Ch. Rep. 371–378; *Kent* v. *Riley*, L. R. 14 Eq. 190; *White* v. *Witt*, 24 W. R. 727; ante, p. 36.

(*f*) 1 Fonbl. Eq. 270.

(*g*) 3 D. J. & S. 302.

settlor had spent all his other assets after the making of the settlement, and before the debt fell due. Lord Westbury, L. C., said: "The defence is, that at the time of making the settlement the debtor reserved and had property enough to pay the plaintiff and all his other creditors in full, and that the settlement therefore is not fraudulent, because the debtor remained solvent after he had made it.

"There is some inconsistency in the decided cases on the subject of conveyances in fraud of creditors; but I think the following conclusions are well founded. If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shewn that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is *immaterial whether the debtor was or [* 47] was not solvent after making the settlement."

"It is obvious that the fact of a voluntary settlor retaining money enough to pay the debts which he owes at the time of making the settlement, but not actually paying them, cannot give a different character to the settlement or take it out of the statute. It still remains a voluntary alienation or deed of gift, whereby in the event the remedies of creditors whose debts existed at the time are 'delayed, hindered, or defrauded.' I am, therefore, of opinion that this settlement is void as against the plaintiff."

Spirett v. *Willows* considered.

The decision in *Spirett* v. *Willows* (*h*) was directly opposed to several cases in which a voluntary settlement has been supported, notwithstanding a prior debt remaining unsatisfied (*i*), and to the principle of those cases in which it has been held that a single debt at the time of the settlement would not do (*k*); and that the settler must be shewn to have been so largely indebted

(*h*) 3 D. J. & S. 293.

(*i*) *East India Co.* v. *Clavel*, Prec. Ch. 377, Gilb. Rep. 37; *Thompson* v. *Webster*, 4 Drew. 628; *Turnley* v. *Hooper*, 2 Jur. (N.S.) 1081; *Exton* v. *Scott*, 6 Sim. 31; *Manders* v. *Manders*, 4 Ir. Eq. 434.

(*k*) *Lush* v. *Wilkinson*, 5 Ves. 384; *Kidney* v. *Coussmaker*, 12 Ves. 148; *Shears* v. *Rogers*, 3 B. & Ad. 362; *Martyn* v. *McNamara*, 4 D. & War. 411, 427; *Skarf* v. *Soulby*, 1 Mac. & G. 374-5; *Jackson* v. *Bowley*, Car. & M. 97; *Richardson* v. *Smallwood*, Jac. 552; *Holmes* v. *Penney*, 3 K. & J. 90; *Townsend* v. *Westacott*, 2 Beav. 340; *Turnley* v. *Hooper*, 3 Sm. & Giff. 349; ante, pp. 37 et seq.; 1 Fonbl. Eq. 279.

as to induce the presumption of a fraudulent intention, and that a man may make a good voluntary settlement though indebted to some extent (*l*), and that "it would be absurd to suppose that a person worth £10,000, and settling £1000, such settlement could be impeached"(*m*).

Freeman v. *Pope.*

In *Freeman* v. *Pope*, (*n*), where a voluntary settlement of a policy of insurance on the settlor's life was made by a settlor really insolvent at the time of making it, and not in a position to make any settlement whatever, the case of *Spirett* v. *Willows*, (*o*) was considered by Lord Hatherley, L.C., and Sir G. M. Giffard, L.J. It was there said by Lord Hatherly, L.C. :

Spirett v. *Willows* explained as a case of plain intent to defraud.

[* 48] *"Of course there may be cases—of which *Spirett* v. *Willows*, (*p*) is an instance—in which there is direct and positive evidence of an intention to defraud independently of the consequences which may have followed, or which might have been expected to follow, from the act. In *Spirett* v. *Willows*, (*p*), the settlor, being solvent at the time, but having contracted a considerable debt which would fall due in the course of a few weeks, made a voluntary settlement by which he withdrew a large portion of his property from the payment of debts, after which he collected the rest of his assets and (apparently in the most reckless and profligate manner) spent them, thus depriving the expectant creditor of the means of being paid. In that case there was clear and plain evidence of an actual intention to defeat creditors. But it is established by the authorities that, in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute."

(*l*) Ibid.

(*m*) Per Lord Cranworth in *French* v. *French*, 6 De G. M. & G. 95, 101; see also *Dewey* v. *Bayntun*, 6 East, 257; *Clements* v. *Eccles*, 11 Ir. Eq. 229, 236-7; post, p. 55.

(*n*) L. R. 5 Ch. 540, 541; but see *Ex parte Mercer*, 17 Q. B. D. 290.

(*o*) 3 D. J. & S. 293.

(*p*) 3 D. J. & S. 293.

It was also there said by Sir G. M. Giffard, L.J.:

"In this case I quite agree with the Vice-Chancellor in thinking that if the propositions laid down in *Spirett* v. *Willows* are taken as abstract propositions, they go too far, and beyond what the law is; but if they are taken in connection with the facts of that case, then, undoubtedly, there is abundantly enough to support the decision, for there was a voluntary settlement by a man who, at its date, was solvent, but immediately afterwards realized the rest of his property and denuded himself of everything. Of course the irresistible conclusion from that was, that the voluntary settlement was intended to defeat the subsequent creditors. That being so, I do not think that the Vice-Chancellor need have felt any difficulty about the case of *Spirett* v. *Willows*, but he seems to have considered that, in order to defeat a voluntary settlement, there must *be [* 49] proof of an actual and express intent to defeat creditors. That, however, is not so. There is one class of cases, no doubt, in which an actual and express intent is necessary to be proved—that is, in such cases as *Holmes* v. *Penny* (*q*) and *Lloyd* v. *Attwood* (*r*), where the instruments sought to be set aside were founded on valuable consideration; but where the settlement is voluntary, then the intent may be inferred in a variety of ways. For instance, if, after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, then the law infers intent, and it would be the duty of a judge, in leaving the case to the jury, to tell the jury that they must presume that that was the intent. Again, if, at the date of the settlement, the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended, by making the voluntary settlement, to defeat and delay them.

The law as laid down in *Spirett* v. *Willows* too wide.

"Now, in this case, at the date of the settlement, Mr. Custance was really insolvent; and if at the date of the settlement the bankers had insisted on payment, and had issued execution, they could not have got a present payment unless they had resorted to that particular policy. That being so, it seems to me that the facts of this case bring the matter entirely within all the decided

(*q*) 3 K. & J. 90.
(*r*) 3 De G. & J. 614.

cases, and it is enough to say that at the date of this settlement Mr. Custance was not in a position to make any voluntary settlement whatever."

Rule laid down by Lord Westbury.

The judgment of Lord Westbury in *Spirett* v. *Willows* (*s*) may now, it is submitted, be taken merely to have established this proposition—that a settlement by a man, owing *any* debt, of all his property available to pay that debt, is within the very words of the statute, and fraudulent and void against that debt (*t*).

The general proposition laid down in that case by Lord Westbury (*u*) was dissented from in *Freeman* v. *Pope*, (*v*) which has been repeatedly followed. The principle of law seems now firmly established, and is this.

True principle now.

A valid voluntary settlement may now be made by a [* 50] settlor * indebted at the time, provided that ample available assets are left out of settlement to meet those debts, whether the debts are actually then payable (*w*), or not (*x*).

Same in America and Upper Canada.

The same is the law in America (*y*), and also in Upper Canada (*z*).

Intention of settlor *at the time*.

The general principle is, that the intention of the settlor *at the time* when he made the settlement, and as inferred from *all* the circumstances at that time, is the test of fraud (*a*); and that a voluntary settlement by

(*s*) 3. D. J. & S. 293.
(*t*) See *Freeman* v. *Pope*, L. R. 5 Ch. at p. 545.
(*u*) 3 D. J. & S. at p. 302.
(*v*) L. R. 5 Ch. 538.
(*w*) *Freeman* v. *Pope*, L. R. 5 Ch. 538, supra, p. 47; *Kent* v. *Riley*, L. R. 14 Eq. 190; *Ex parte Huxtable*, 2 Ch. D. 54; but see *Spirett* v. *Willows*, 3 D. J. & S. at p. 302.
(*x*) *In re Ridler*, 22 Ch. D. 74.
(*y*) Bump. Fr. Conv. (Amer.), 2nd ed. 275.
(*z*) *O'Dogherty* v. *The Ontario Bank*, 32 C. P. 285.
(*a*) See *Stone* v. *Grubham*, 2 Buls. 225; *Nunn* v. *Wilsmore*, 8 T. R. 521; *Meux* v. *Howell*, 4 East, 1; *Taylor* v. *Jones*, 2 Atk. 600, 602-3; *Wrixon* v. *Cotter*, 1 Ridgw. P. C. 302; *Graham* v. *Furber*, 14 C. B. 410; *Richardson* v. *Smallwood*, Jac. 552; *Henderson* v. *Lloyd*, 3 F. & F. 7; *Holt* v. *Kelly*, 13 Ir. L. Rep. 33; *Ware* v. *Gardner*, L. R. 7 Eq. 317; and by the civil law there was the same kind of intention inferred from the circumstances: "Quamvis non propnatur consilium fraudandi habuisse, tamen qui creditores habere se scit et universa bona sua alienavit, *intelligendus est* fraudandorum creditorum consilium habuisse." Dig. lib. 42, tit. viii. par. 17, sec 1; and see Sir R. T. Kindersley's judgment in *Thompson* v. *Webster*, 4 Drew. 628, 632; *In re Johnson*, 20 Ch. D. at p. 394, S. C. 51 L. J. (N.S.) Ch. 503; *In re Maddever*, 27 Ch. D. 523; *Ex parte Mercer*, 17 Q. B. D. 290.

a person not deeply indebted, and not with a fraudulent intention, is good, although the settlor afterwards becomes indebted (*a*). But a voluntary settlement made in 1858, by a settlor owing no debts at the time, and not a trader till 1873, which gave the settlor a life estate determinable on bankruptcy, was held fraudulent within this statute, because it so dealt with his property as to disappoint the just claims of his creditors (*b*).

Bonâ fide voluntary deed good against subsequent creditors.

Again, it has been laid down that no inquiry as to the state of the settlor's circumstances when he made the settlement will be directed unless a debt at that time can be proved (*c*); in one case an inquiry was refused, although a small debt owing at the date of the settlement was in evidence (*d*). But in *Taylor* v. *Coenen* (*e*) * although there was no proof that [* 51] *any* debt was contracted before the date of the first of two voluntary settlements, inquiries were directed as to the state of the settlor's affairs at the date of each of those settlements.

Inquiries directed only when previous debt proved.

Where, at the time when the settlement was made, there remained property, not included in it, ample and available for the payment of debts (*f*), and no special circumstances of fraud, how can it be said that any creditor was either defrauded or delayed by the settlement? If he had at once taken steps to recover the amount due to him, the settlement would have been no obstacle to his getting his money; but if he neglects to do that, and waits until, by a reverse of circumstances, the settlor becomes embarrassed, it is his own laches,

Can creditors be delayed by a settlement when the settlor was then able to pay all his debts?

(*a*) Per Lord Hardwicke in *Russel* v. *Hammond*, 1 Atk. 13; *Walker* v. *Burrows*, 1 Atk. 94; and *Townshend* v. *Windham*, 2 Ves. 1, 10; Sir Lord Kenyon in *Stephens* v. *Olive*, 2 Bro. C. C. 90; and Sir T. Plumer in *Holloway* v. *Millard*, 1 Mad. 418; *Clements* v. *Eccles*. 11 Ir. Eq. 229, 237; *Gugen* v. *Sampson*, 4 F. & F. 974; *Crossley* v. *Elworthy*, L. R. 12 Eq. 167; *Mackay* v. *Douglas*, L. R. 14 Eq. 121; *Kent* v. *Riley*, L. R. 14 Eq. 190; *White* v. *Witt*, 24 W. R. 727; ante, p. 36.

(*b*) *In re Pearson*, 3 Ch. D. 807, post, p. 68; see *Learmouth* v. *Miller*, L. R. 2 H. L. Sc. 438.

(*c*) *Lush* v. *Wilkinson*, 5 Ves. 384; see 12 Ves. 148; *Norcutt* v. *Dodd*, Cr. & P. 100; *Skarf* v. *Soulby*, 1 Mac. & G. 364; *Holloway* v. *Millard*, 1 Mad. 414; post, pp. 516-518.

(*d*) *Manders* v. *Manders*, 4 Ir. Eq. Rep. 434.

(*e*) 1 Ch. D. 636.

(*f*) See the Bankruptcy Acts, 1869, s. 91, 1883, s. 47; ante, pp. 42, 43, 50; *Kent* v. *Riley*, L. R. 14 Eq. 190; *White* v. *Witt*, 24 W. R. 727.

and not the settlement, which has prevented him from being paid in full (*g*).

The question, whether a voluntary settlement can stand against creditors at its date, does not depend on whether they are willing to forego the immediate payment of their debts, if then due; but on this question, whether they are entitled to press for payment, and, if so, whether they *can* get a present payment without resorting to the property in settlement (*h*). If they are so entitled, and cannot get such a payment, the settlement is fraudulent and void against them.

Settlements by men about to trade of whole or bulk of property void.

There is a special class of cases, in which voluntary settlements made by persons who shortly afterwards go into *trade* have been held fraudulent and void within the statute.

The principle of the decisions is that a man who is about to engage in a hazardous business is not entitled, [* 52] *whether owing any* * *debts or not*, to settle the whole or the bulk of his property, so as to put it out of the reach of his creditors.

Crossley v. *Elworthy*.

In *Crossly* v. *Elworthy* (*i*) a voluntary post-nuptial settlement was made by the managing director of a company, who became insolvent within nine months afterwards. Some of the debts due from him at the date of the settlement remained unpaid at the date of the suit. At the date of the settlement the settlor had incurred heavy liabilities as a surety for the company on a mortgage debt of £35,000 as indorser, without consideration, of certain bills of exchange drawn by the company, and then current, and in respect of very large

(*g*) *Clements* v. *Eccles*, 11 Ir. Eq. 229, 237. Trustees, who are only bound to take the same care of property intrusted to them as if it were their own (*Morley* v. *Morley*, 2 Ch. Ca. 2; *Jones* v. *Lewis*, 2 Ves. 240), ought not to leave property outstanding on personal security, and must, if necessary, commence legal proceedings: *Lowson* v. *Copeland*, 2 Bro. C. C. 156; *Bailey* v. *Gould*, 4 Y. & C. Ex. Ca. 221; *Powell* v. *Evans*, 5 Ves. 839; *Caney* v. *Bond*, 6 Beav. 486; *Fenwick* v. *Greenwell*, 10 Beav. 412; *Tickner* v. *Smith*, 3 Sm. & Giff. 42, 46; unless they can shew reasonable grounds for believing that legal proceedings would have been useless: *Hobday* v. *Peters*, 28 Beav. 603.

(*h*) *Freeman* v. *Pope*, L. R. 5 Ch. 543, 545; *In re Ridler*, 22 Ch. D. 74; *Green* v. *Paterson*, 32 Ch. D., per Cotton, L.J., 105; ante, p. 50.

(*i*) L. R. 12 Eq. 158; and see *Ware* v. *Gardner*, L. R. 7 Eq. 317.

speculative transactions on the Stock Exchange. After the date of the settlement, a judgment was obtained against him for a sum of £36,252 8*s.* on account of false and fraudulent misrepresentations made by him before the date of the settlement.

Sir R. Malins, V.C., held the settlement within the purview of the statute and void against creditors. He there said: "Now, considering that he (Mr. Elworthy) had made a settlement only nine months previously, I think that state of things is sufficient to relieve those who desire to impeach the settlement from proving insolvency, and to throw upon Mr. Elworthy the burden of proving that he was in a position to make the settlement. The general policy of the Act of 13 Eliz. c. 5, is, that those who are engaged in the transactions of life, buying or selling, or otherwise indebted, are not, by means of a voluntary settlement, to take their property out of the reach of their creditors. If a man does, under such circumstances—that is, when it is doubtful whether he is in a solvent condition, and, if so, whether he is likely to remain so—make a settlement, it seems to me in the highest degree reasonable that upon him should be thrown the burden of proving that he was in a condition to make it when it was executed" (*k*). After examining the state of the assets and liabilities, and citing the cases of *Townsend* v. *Westacott* (*l*) and *Skarf* v. *Soulby* (*m*), his Lordship continued: "It is clear that, though the mere fact of a man being indebted is not fatal to a settlement, it is not necessary to prove actual insolvency, but if insolvency takes place shortly after the execution of the settlement, that is enough."

*This decision has been followed in the cases of [*53] *Mackay* v. *Douglas* (*n*), and *In re Pearson* (*o*), in which last case there was no debt due at the date of the settlement still unpaid, and also in *Taylor* v. *Coenen* (*p*), where the settlement was of a very trifling amount compared with the amount of the business. In *Ex parte Russell* (*q*) the settlor's debts exceeded his available assets at the date of his settlement, by which he settled

(*k*) *Crossley* v. *Elworthy*, L. R. 12 Eq. at p. 164.
(*l*) 2 Beav. 340.
(*m*) 1 Mac. & G. 364.
(*n*) L. R. 14 Eq. 106. See post, p. 65.
(*o*) 3 Ch. D. 807. See p. 68.
(*p*) 1 Ch. D. 636.
(*q*) 19 Ch. D. 588. See post, p. 66.

substantially the whole of his property upon his wife and children. It was held that the settlement was plainly void, because its object was to protect him against the eventuality of bankruptcy—to save the property for his wife and children in case the new business should not succeed (*q*).

Insolvency will not avoid deed if it could not have been foreseen.

The mere fact of subsequent insolvency, if it does not result from the conveyance, or if it could not be regarded as within the contemplation of the settlor at the time of the conveyance, will not of itself avoid the deed. Thus, when a man is solvent at the time of the settlement, but becomes insolvent the next year by reason of some unexpected loss which he could not have foreseen, such settlement will not on that account be held void (*r*).

So in America a voluntary settlement will be upheld, even if the property left unsettled turns out to be inadequate to pay all the settlor's then existing debts—if, but only if, this inadequacy can be proved to be due to some *accident* which the settlor could not guard against, as sudden losses in trade, or fire, or storms (*s*).

In America doctrine of *Spirett* v. *Willows* brought forward and subsequently overruled.

In America, where the statute has been adopted, there has been a similar divergence from the general construction in this respect in a case (*t*) where it was said that, if a person indebted makes a voluntary settlement it is presumed to be fraudulent in respect to such debts (that is, those antecedently due), and no circumstance will permit those debts to be affected by it or repel the presumption; that the presumption does not depend on the amount of debts or the extent of the property in [*54] settlement, or the *circumstances of the party; for to attempt a line of distinction would be embarrassing, if not dangerous, to the rights of creditors, and prove an inlet to fraud. In America, however, the doctrine has, by decision of the Supreme Courts, been brought back to its former position, and there, and now in England, the law may be said to be that the mere fact of the settlor being indebted to a small amount will not make a deed fraudulent even against existing creditors; but

(*q*) This principle has been followed in America and Upper Canada: *Buckland* v. *Rose*, 7 Chy. 440; *King* v. *Keating*, 12 Chy. 29; Bump. Fr. Conv. (Amer.), 2nd ed. 310.

(*r*) *Holloway* v. *Millard*, 1 Mad. 414; *Mackay* v. *Douglas*, L. R. 14 Eq. 121.

(*s*) Bump. Fr. Conv. (Amer.), 2nd ed. 285, 286.

(*t*) *Reade* v. *Livingston*, 3 Joh. Ch. Rep. 500.

the fact of his being so deeply indebted as to be insolvent without the settled property always makes his voluntary settlement void against creditors (*u*).

Voluntary deed to be judged by all the circumstances of the settlor.

The way in which a voluntary settlement is regarded with respect to all the circumstances of the settlor, may be seen from Lord Cranworth's remarks in *Goldsmith* v. *Russell* (*v*). In that case A., in the same month in which the plaintiff obtained judgment for his debt, and being otherwise largely indebted, conveyed his interest in certain real estate to trustees to sell, and settled the proceeds of the sale on his wife and children. His Lordship remarked, on the state of circumstances which led to the settlement—that it was not one which A. was in any way bound to make; it was said to have been made in pursuance of a previous parol agreement; this allegation was very loosely made; it seemed to have rested on understanding only; it was not obligatory; which of itself would be sufficient to bring the case within the statute of Elizabeth; but besides this, there was much contrivance to shew that the settlement was for value when it was not; the transaction might have been bonâ fide, but it took place on the eve of the judgment being entered up, and the story as to money having been paid and then returned for the purpose of paying urgent claims, was very improbable. His going abroad on account of ill-health just at the time when his creditors were most urgent, was a very suspicious occurrence; and upon all the * circumstances [* 55] of the case, his Lordship came to the conclusion that the whole transaction was a fraudulent contrivance concocted when the settlement was made.

Amount settled material.

The amount of property withdrawn by the settlement from liability to the claims of creditors must be taken into consideration ; for a person may, although indebted at the time, settle some portion of his property, provided that enough is left for satisfying his debts.

(*u*) *Hinde's Lessee* v. *Longworth*, 11 Wheaton, 199; *Sexton* v. *Wheaton*, 8 Wheaton, 229, 230; *Salmon* v. *Bennett*, 1 Connect. Rep. 525, 548 et seq.; *Jackson* v. *Town*, 4 Cowen, 604; *Verplank* v. *Sterry*, 12 Johns. (Amer.), 536; Bump. Fr. Conv. (Amer.), 2nd ed. 273, 274, 276; 1 Story, Eq. Jur. 12th ed. 355, 362, 364, 365; *Richardson* v. *Rhodus*, 14 Rich. S. C. 95, 19 L. T. (N.S.) 106; *Babcock* v. *Eckler*, 24 New York, 623; and *Sedgwick* v. *Place*, 25 L. T. (N.S.) (Amer.), 307.

(*v*) 5 De G. M. & G. 547, 555. See also *Richardson* v. *Smallwood*, Jac. 552, 557-558; *Abbott* v. *Burbage*, 2 Bing. N. C. 444; *Freeman* v. *Pope*, L. R. 5 Ch. 538; *Ex parte Russell*, 19 Ch. D. 588.

Thus, it would be absurd to suppose that a person worth £10,000 and settling £1000, such settlement could be impeached; but if, having £10,000 and owing that amount, he settled £5000, it would be clearly a fraud (*w*). Policies of assurance on the settlor's own life are securities for money under 1 & 2 Vict. c. 110 (*x*), and liable to be taken in execution during the debtor's life and on his bankruptcy pass to his trustee. So a settlement of policies of assurance on the settlor's life was declared fraudulent and void against his creditors within this statute, and assets for payment of his debts (*y*).

Value, &c., of property unsettled to be submitted to jury.

So also in a trial by jury, it is material to submit to them the relative value of the property withdrawn from the reach of the creditors in proportion to the amount of their demand at the time, and the value and tangibility of that substituted in its place, in aid of the conclusion whether or not the deed was covinous against them (*z*). For the purpose of having these facts inquired into and fully stated to the jury, a new trial was granted where the verdict had been given, founded on—1. The previous embarrassment of the husband; 2. The want of notoriety of the conveyance at the time; 3. The want of an inventory; 4. The continuance of the husband in possession consistently with the deed, but without notice of the change of property; and 5. The appropriation by the husband to his own use of a part of the money raised by the trustees of the settlement (*a*).

Settlement which does not withdraw any property from creditors not fraudulent.

But where the effect of a settlement, made even by a person largely indebted, is not to withdraw any portion [* 56] of the debtor's *property from the power of creditors, but merely to vary the investment, this settlement will not be within the statute. Thus, where property was settled to such uses as the husband and wife should jointly appoint, and subject thereto to the husband in fee, and the wife joined in appointments by way of mortgage to raise the purchase-money for other estates which were settled on her and her husband, it

(*w*) *French* v. *French*, 6 De G. M. & G. 95–101. See also *Clements* v. *Eccles*, 11 Ir. Eq. Rep. 229, 236–237; *Kent* v. *Riley*, L. R. 14 Eq. 190; *Taylor* v. *Coenen*, 1 Ch. D. 636.

(*x*) Supra, p. 20.

(*y*) See *Taylor* v. *Coenen*, 1 Ch. D. 636, 641, 642; and *Freeman* v. *Pope*, L. R. 5 Ch. 538.

(*z*) *Dewey* v. *Bayntun*, 6 East, 257, 282.

(*a*) *Dewey* v. *Bayntun*, 6 East, 257.

was held that this second settlement was not voluntary nor void against the prior creditors (*b*).

The Court, in deciding questions on this statute, places conveyances on meritorious consideration on the same footing as those which are purely voluntary (*c*). In fact, a gift to a relative is frequently open to more suspicion than one to a stranger; for where a man, being greatly indebted to sundry persons, makes a gift to his son without consideration, but only of nature, the law intends a trust between them, scilicet, that the donee would, in consideration of such gift being voluntarily and freely made to him, and also in consideration of nature, relieve his father or cousin, and not see him want who had made such a gift to him (*d*). For these reasons the Court feels bound to decide for creditors against a wife and children; for though it always has great compassion for a wife and children (*e*), yet, on the other side, it is possible, if creditors should not have their debts, *their* wives and children may be reduced to want (*f*). But the mere fact of selling to a relative is not of itself an evidence of fraud (*g*), and in the absence of anything fraudulent the Court will not say that a man may not sell to a relation on better terms than he would have to give to a stranger (*h*).

Meritorious consideration of no avail.

Gift to relative open to more suspicion than one to a stranger.

So when a bonâ fide and honest instrument is executed for which the consideration is partly meritorious and partly valuable, and the instrument is one between relatives, the Court cannot say that the difference between the real value of the estate, and the *consideration given is a badge of fraud, and if it is not a badge of fraud, or evidence of an intention to defeat creditors, it has no relation to the case (*i*). [* 57]

(*b*) *Acraman* v. *Corbett*, 1 J. & H. 410. See *Jones* v. *Boulter*, 1 Cox, 288.

(*c*) *Strong* v. *Strong*, 18 Beav. 408; *Holloway* v. *Millard*, 1 Mad. 414, and see *In re Johnson*, 20 Ch. D. 389; S. C. 51 L. J. (N.S.) Ch. 503. The same is the case in Upper Canada. See *Merritt* v. *Niles*, 28 Chy. 346.

(*d*) *Twyne's Case*, 3 Rep. 81 b; *Cornish* v. *Clark*, L. R. 14 Eq. 184.

(*e*) A provision for children is said to be founded on an equitable consideration: *Rigden* v. *Vallier*, 2 Ves. 258.

(*f*) *Taylor* v. *Jones*, 2 Atk. 600–3.

(*g*) *Copis* v. *Middleton*, 2 Mad. 423; *In re Johnson*, 20 Ch. D. 389.

(*h*) Per Lord St. Leonards, in *Moore* v. *Crofton*, 3 J. & Lat. 443; post. p. 81, note (*y*).

(*i*) *In re Johnson*, 20 Ch. D., per Fry. J., 391, 397.

Liabilities estimated at date of settlement.

In examining the position of the settlor's affairs, the true test is, what is the nature and extent of his liabilities *at the time* of making the settlement? Those liabilities, whether they consist of debts actually due, or soon due or of merely remote and contingent liabilities, must be estimated as a reasonable and not a sanguine man would estimate them, taking a reasonable view of what seems likely to happen (*k*). It seems at least doubtful whether a voluntary settlement of *all* the settlor's property, even if not a trader, can in any case be supported against any even contingent liability, if that liability ripens into an actual debt (*l*).

Nature of debts owing by settlor.

Mortgage debt of no importance.

The question is varied also by the nature of the debt owing; the existence, for example, of a mortgage debt is of no importance (*m*). The subsequent voluntary conveyance cannot possibly affect the mortgagee's rights; for, if the mortgaged property is comprised in the voluntary deed his claim is paramount to that of the volunteers, whose right can only extend to the equity of redemption, and if the settlement is of other property than that mortgaged it does not touch the mortgagee, for he has still the security for which he bargained. And on the general question of the state of the settlor's affairs, a mortgage debt may be considered merely a conversion of a certain portion of land into money, or as a reduction pro tanto of the settlor's property available to creditors, which is material in a calculation of how much he was worth at the time as against debts due.

So a voluntary settlement of property subject to a mortgage with a covenant by the settlor to pay off the mortgage debt and to pay the interest on it, was held void, under the Bankruptcy Act, 1869, s. 91, because the settlor thereby left out of settlement an amount of assets insufficient to pay *both* the mortgage debt [* 58] * and his other debts; though if the settlement had been of the equity of redemption only, the settlor's other assets were ample to pay his debts at the time of the settlement (*n*). A mortgage debt is not of itself a debt within the statute, though if the property mort

(*k*) *Crossley* v. *Elworthy*, L. R. 12 Eq. 167, *Ex parte Russell*, 19 Ch. D. 588; *In re Ridler*, 22 Ch. D. 74, 82; *Ex parte Mercer*, 17 Q. B. D. 290.

(*l*) *In re Ridler*, 22 Ch. D. per Selborne, L. C., 80.

(*m*) *Stephens* v. *Olive*, 2 Bro. C. C. 90; *Lush* v. *Wilkinson*, 5 Ves. 384; *Jenkyn* v. *Vaughan*, 3 Drew. 419–426; *Manders* v. *Manders*, 4 Ir. Eq. 434, 438; *Ware* v. *Gardner*, L. R. 7 Eq. 317.

(*n*) *Ex parte Huxtable*, 2 Ch. D. 54.

gaged proves insufficient the unpaid surplus is a debt (*o*).

The giving of a mortgage on property is merely the exercise by the debtor of a legitimate mode of conferring a preference or priority on a particular creditor, which the mortgagor can exercise as to all or any part of his property, without the transaction falling within the statute, so long as it is bonâ fide—that is to say, so long as the mortgagor does not retain any benefit for himself (*p*).

If the liabilities are due to large and very fluctuating transactions on the Stock Exchange, it would increase the difficulty of the settlor to prove his solvency at the time of the settlement (*q*).

So the amount due from a partner to or on account of his firm, at the time of his making a voluntary settlement of part of his property, must be treated as one of his then existing debts (*r*).

So a merely contingent debt, as a covenant by a husband to pay a sum of money to his wife if she survived him, has been held enough to avoid a voluntary settlement (*s*), but not when the settlor owed no money at all at the date of the settlement, and the contingency was a claim for damages in an action started just before its execution (*t*).

A guarantee given by a person who settles the bulk of his property must be regarded as a contingent liability, against which available assets should be provided, in order to support such settlement. For the guarantee must be viewed as if the event had already happened, the possibility of which the parties must have had in contemplation when the guarantee was given of the debtor being unable to pay. The state of the assets of *the guarantor is the question which the Court [* 59] considers. The guarantee must not be regarded as a liability which might never become a debt (*u*).

(*o*) Post, pp. 163, 164; *Harman* v. *Richards*, 10 Hare, 81 post, p. 269.
(*p*) *Middleton* v. *Pollock*, 2 Ch. D. 104; *Ex parte Games*, 12 Ch. D. 314.
(*q*) *Crossley* v. *Elworthy*, L. R. 12 Eq. 164, 166.
(*r*) *Denison* v. *Tattersall*, 18 L. T. (N.S.) 303.
(*s*) *Rider* v. *Kidder*, 10 Ves. 360.
(*t*) *Ex parte Mercer*, 17 Q. B. D. 290.
(*u*) *In re Ridler*, 22 Ch. D. 80, 82.

Indeed, it was said by Lord Justice Turner, in *Goodriche* v. *Taylor* (*v*), that "Every surety must be taken to contemplate that he may be called upon to pay the debts for which he is surety, and he can no more be justified in placing the whole of his property out of the reach of his liability to pay them, than if he were the principal debtor." So damages recovered in an action begun after the settlement in respect of misrepresentations made before it, will be considered as part of the settlor's liabilities (*w*).

Nature of assets.

And in like manner the nature of the assets is to be taken into consideration. For the purposes of this statute the test is, as under the Bankruptcy Acts, 1869 and 1883 (*x*), whether the assets are *available* for creditors *at the time* the settlement is made.

Assets must be *available* at date of settlement.

This principle seems to have been adopted in *Freeman* v. *Pope* (*y*). The settlor held two livings, producing a net income of £815, and a government life annuity of about £180. Lord Hatherley, L.C., said: "When the settlor had made the voluntary assignment of the policy, he stood in this position, that he had literally nothing wherewithal to pay or to give security for the debt of £489, except the surplus value of the furniture, which must be taken to be worth about £200, and he was clearly and completely insolvent the moment he had executed the settlement, even if we assume that some portion of his tithes and of the annuity was due to him;" giving him credit only for the amount *actually due* on account of the annuity and tithes at the date of the settlement. The ground of this was that as the settlor could not at once put his hands upon the sum of £489, so as to apply it towards satisfying the debt, the act of making the settlement shewed an intention to delay creditors.

So the goodwill of a business cannot be reckoned as [* 60] an asset, * nor can the plant of an iron and coal partnership, because it is not available (*z*). So the value of implements of trade and fixtures should

(*v*) 2 De G. J. & S. 141.
(*w*) *Crossley* v. *Elworthy*, L. R. 12 Eq. 158, 168, 169; and see *Ex parte Mercer*, 17 Q. B. D. 290.
(*x*) *Ex parte Russell*, 19 Ch. D. 598.
(*y*) L. R. 5 Ch. 538, 542, 543; ante, p. 47. See *French* v. *French*, 6 De G. M. & G. 106; *Ex parte Russell*, 19 Ch. D. 588.
(*z*) *Dennison* v. *Tattersall*, 18 L. T. (N.S) 303; *Ex parte Russell*, 19 Ch. D. 588.

only be reckoned at the value they would fetch by a forced sale, and not at any fancy price which the settlor might choose to put on them (*a*). The fair way, under the Bankruptcy Acts, 1869 and 1883, to value the assets of a trader who is carrying on his business is to consider the position he is assuming, and to see whether he can pay his debts in the way in which he proposes to pay them—that is, by continuing his business (*b*). So a debt due to the settlor by a person for whom he was a guarantee cannot be treated as an available asset (*c*).

So the fact that the assets have been lost or rendered unavailable to pay debts not payable at the time of the settlement, as by an investment in a solid undertaking to which a heavy or an unlimited liability attached, will not of itself bring the settlement within the statute (*d*).

Where a trader carried on his business up to the time of his death, the Court will act upon the valuation made by a competent valuer, both as regards his stock and the bills for which the deceased may have been liable, as its sole basis (*e*).

The same principles of estimating the liabilities and assets of the settlor at the time of executing the voluntary settlement obtain in America (*f*).

(*a*) *Ex parte Russell*, 19 Ch. D. 597
(*b*) *Ex parte Russell*, 19 Ch. D., per Lindley, L.J., 601.
(*c*) *In re Ridler*, 22 Ch. D. 80.
(*d*) *Freeman* v. *Pope*, L. R. 5 Ch. 538; *In re Ridler*, 22 Ch. D. 79.
(*e*) *Taylor* v. *Coenen*, 1 Ch. D. 640.
(*f*) See Bump. Fr. Conv. (Amer.), 2nd ed. 279–285.

* CHAPTER III.

VOLUNTARY CONVEYANCES AS AGAINST SUBSEQUENT CREDITORS.

Paying off debts owing at time of settlement and substituting fresh will not make good a voluntary settlement.

It would be very inconsistent with the generally beneficial effect of the statute if the rights of creditors as against a voluntary conveyance by a person in embarrassed circumstances could be defeated by the formal object on that the debts which were owing when the deed was executed had been paid off and replaced by fresh liabilities. It is clear, therefore, that if a man under those circumstances made a voluntary conveyance or settlement, and then made an arrangement by which the existing creditors were paid off and new creditors substituted, the conveyance or settlement would be void against such subsequent creditors (*g*). The ground on which such a settlement is held void as against subsequent creditors is that it would have been held void if impeached by the existing creditors, and that the substitution of a new set of creditors, being merely a device to evade the statute, is a fraud upon that statute. Thus where (*h*) the voluntary settlor was, at the time of the settlement, indebted to the plaintiff on the balance of a mining account, and afterwards paid on account large sums, exceeding the debt due prior to the deed, but the balance against him kept increasing until his death, the settlement was set aside.

But, if such settlement could not be impeached by the existing creditors, the mere fact of substituting a

(*g*) *Richardson* v. *Smallwood*, Jac. 552; *Holmes* v. *Penney*, 3 K. & J. 100.

(*h*) *Whittington* v. *Jennings*, 6 Sim. 493. *Freeman* v. *Pope*, L. R. 9 Eq. 206, S. C. 5 Ch. 538, was in fact much the same sort of case. But see *White* v. *Witt*, 24 W. R. 727. And so by the civil law: "Si illos dimisit quorum fraudandorum causâ fecit, et alios sortitus est, si quidem simpliciter dimissis prioribus quos fraudare voluit, alios postea sortitus est, cessat revocatio. Si autem horum quas pecuniâ fraudare noluit priores dimisit quos fraudare voluit" it shall be void. Dig. lib. 42, tit. viii. par. 10 sec. 1.

fresh set of creditors could not of itself render the settlement void against subsequent creditors (*i*).

* Where the settlement was allowed to be [* 62] acted on for a considerable time and was founded on meritorious consideration, and there was a doubt whether the plaintiff's debt accrued till after the settlement, Lord Hardwick refused to interfere (*k*). Doubt whether debts prior or subsequent.

It is clear, moreover, that where, at the suit of prior creditors, an order is obtained setting aside a settlement or other fraudulent alienation of property, that property becomes liable to the claims of all the creditors generally, and subsequent creditors are let in and participate pro ratâ (*l*). When set aside by prior creditors, all creditors let in.

This is analogous to the old bankrupt law, which affected traders only, and under which it was held that a trader, after having retired from business, could not be made a bankrupt for debts contracted after he retired, but that, if the old creditors sued out a commission, the new creditors should be admitted to have a share of the estate (*m*). Analogy in old bankrupt law.

This participation of subsequent creditors, at first sight, seems contrary to the express words of the Act, which declares fraudulent deeds, &c., void "only as against that person or persons, &c., whose actions, suits, &c., are, shall, or might be, in anywise disturbed, hindered, delayed, or defrauded." But a construction has been adopted more congenial to the general spirit of the enactment, which (as so often declared) is to be construed liberallly in the suppression of fraud and for the benefit of creditors. For the Statute speaks of those who *might* be hindered; and when a man is prejudicing his existing creditors, he is doing an act by which all creditors, present and future, might be defrauded. It has never been determined that, in order to make void a deed, the creditor must be actually hindered or delayed (*n*); and "if a debtor makes a Seems contrary to the words of the statute.

(*i*) *Kent* v. *Riley*, L. R. 14 Eq. 190.
(*k*) *White* v. *Sansom*, 3 Atk. 411.
(*l*) *Jenkyn* v. *Vaughan*, 3 Drew. 419; *Richardson* v. *Smallwood*, Jac. 552; *St. Amand* v. *Countess of Jersey*, Com. Rep. 255; *Beaumont* v. *Thorpe*, 1 Ves. 27; *Strong* v. *Strong*, 18 Beav. 408; *Taylor* v. *Jones*, 2 Atk. 600; and see *Gugen* v. *Sampson*, 4 F. & F. 974; and see post, pp. 68 515.
(*m*) *Meggot* v. *Mills*, 1 Ld. Raym. 286–7.
(*n*) *Richardson* v. *Smallwood*, Jac. 552; *Graham* v. *Furber*, 14 C. B. 410; *Jenkyn* v. *Vaughan*, 3 Drew. 419.

fraudulent gift to defraud one creditor only, it is void against all creditors and all forfeitures" (*n*); and that it is the law is well established by high authority from an [* 63] early * period. Lord Hardwicke said, in *Walker* v. *Burrows*, (*o*), that, "if there had been proof that Burrows (the settlor) was indebted at the time, it would have run on so as to take in all subsequent creditors." And so in *Townshend* v. *Windham*, (*p*) the same great judge said he knew of no case upon the statute 13 Eliz. c. 5 where a man indebted "made a voluntary conveyance and died indebted, but that it should be considered part of his estate for the benefit of his creditors.

The case of *Kidney* v. *Coussmaker* (*q*) might be thought to be at variance with this doctrine. There Sir W. Grant said that, though there had been much controversy and a variety of decision upon the question whether such a settlement is fraudulent as to any creditors except such as were creditors at the time, he was disposed to follow the latest decision, that of *Montague* v. *Sandwich* (*r*), that the settlement is fraudulent only against such creditors as were creditors at the time. But this, it seems, does not mean that the settlement, though set aside against prior creditors, was good against debts subsequently contracted, but that the question, whether the settlement was fraudulent or not, depended on whether there were prior creditors and the amount of their debts; and to ascertain this an inquiry was directed; and *Montague* v. *Sandwich* (*s*) is open to the same construction (*t*).

Voluntary conveyance by persons indebted may be set aside by subsequent creditor.

Where a voluntary settlement has been made by a person "indebted" (*u*), *any* creditor who was such at the date of its execution, or who became such after that date, so long as any one of the original creditors is still unpaid, can impeach the settlement (*v*).

(*n*) Per Sir W. Jones in *Turberville* v. *Tipper*, Palm. 415, n.; ante, pp. 40, 41; post, pp. 98, 99.
(*o*) 1 Atk. 94.
(*p*) 2 Ves. 11; and see *Beaumont* v. *Thorpe*, 1 Ves 27.
(*q*) 12 Ves. 136–155.
(*r*) 12 Ves. 148.
(*s*) 12 Ves. 148 n., 155, n.
(*t*) See *Holloway* v. *Millard*, 1 Mad. 414, 421.
(*u*) Ante, pp. 35 et seq.
(*v*) *Jenkyn* v. *Vaughan*, 3 Drew. 419; *Freeman* v. *Pope*, L. R. 9 Eq. 206, S. C. 5 Ch. 538; post, pp. 518 et seq.

If such settlement was made by a person at that time really insolvent, that is to say, not in a position to make any settlement whatever, that settlement may be impeached by a creditor, though * subsequent— [* 64] though no debt is proved to exist which was contracted at the date of the settlement (*v*).

Voluntary settlements as against subsequent creditors.

This leads to the inquiry, what will make void against *subsequent* creditors a voluntary settlement which is not to be presumed fraudulent merely because of the settlor's embarrassed circumstances when he made it?

Where the settlor was not indebted at the time, the onus of proving the fraud is thrown on those who impeach the settlement, for fraud is not to be presumed. The facts that all the debts due at the date of the settlement have been paid since, and that the only debts due are those subsequently contracted, negative the inference of intent to defeat, delay, or defraud creditors drawn from indebtedness at the time (*w*). The mere fact of subsequent indebtedness is not evidence of a fraudulent intent against subsequent creditors (*x*). But where the settlement is impeached on the ground of the settlor's having become actually insolvent soon after the date of the settlement, it lies on him to shew he was in a position to make the settlement (*y*). If bonâ fide, the settlement will stand, though voluntary; "but if any mark of fraud, collusion, or intent to deceive subsequent creditors appears, that will make it void" (*z*).

Creditors and "others."

In the preamble the object of the statute is declared to be for the avoiding, &c., of feigned, covinous, and fraudulent feoffments, &c., devised and contrived, &c., to delay, hinder, or defraud creditors and *others* of their just and lawful actions, &c. The statute is for the pro-

(*v*) *Crossley* v. *Elworthy*, L. R. 12 Eq. 158; *Taylor* v. *Coenen*, 1 Ch. D. 636.

(*w*) *Jenkyn* v. *Vaughan*, 3 Drew. 425; and see *Smith* v. *Tatton*, L. R. 6 Ir. 32.

(*x*) *Smith* v. *Tatton*, L. R. 6 Ir. 32; *Ex parte Mercer*, 17 Q. B. D. 290; and see Bump. Fr. Conv. (Amer.), 2nd ed. 310.

(*y*) Per Sir T. Plumer in *Richardson* v. *Smallwood*, Jac. 552–557; and see *Rock* v. *Dade*, post, App. No. XIII.; *Crossley* v. *Elworthy*, L. R. 12 Eq. 158; *Mackay* v. *Douglas*, L. R. 14 Eq. 106; *In re Pearson*, 3 Ch. D. 807; *Ex parte Russell*, 19 Ch. D. 588; post, p. 520.

(*z*) Per Lord Hardwicke in *Townshend* v. *Windham*, 2 Ves. 1–11; *Ware* v. *Gardner*, L. R. 7 Eq. 317; *Alton* v. *Harrison*, L. R. 4 Ch. 626; *Middleton* v. *Pollock*, 2 Ch. D. 108; *Ex parte Games*, 12 Ch. D. 324; *Smith* v. *Tatton*, L. R. 6 Ir. 32.

Taylor v. *Jones.*

tection of creditors and *others*, not creditors only (*a*). The word "others," it has been said, seems to be inserted with the express intention that the operation [* 65] may not be * confined to those who are creditors at the time; and in the enacting clause the word "creditors" is not used, but general words, "person or persons," pointing more strongly in the same direction. "The words of the statute, therefore," it was said, "seem to be so general, in order to take in all persons who shall be anyways hindered or delayed" (*b*); and the question being, whether the debts contracted after the settlement were included in this statute of 13 Eliz. c. 5, it was decided that they were, there being an intention at the time of defrauding *future* creditors. It appears, though, that in this case there were debts prior as well as subsequent to the settlement, and it has been several times decided that the settlement is fraudulent only as against such creditors as were creditors at the time (*c*). But it does not appear that there was in those cases anything from which an intention of defrauding *future* creditors could be collected; the weight, too, of Lord Hardwicke's authority is the other way, and, as usual, he has been followed in later cases. Thus, in *Stileman* v. *Ashdown* (*d*) he said: "It is not necessary that a man should be actually indebted at the time he enters into a voluntary settlement; for if a man does it with a view of being indebted at a future time it is equally fraudulent, and ought to be set aside."

Stileman v. *Ashdown.*

Settlement by man about to trade.

The principle laid down by Lord Hardwicke in *Stileman* v. *Ashdown* (*e*) has been followed in and extended to the case of a man who actually contemplates, or may be considered to contemplate, going into trade.

Mackay v. *Douglas.*

In *Mackay* v. *Douglas* (*f*) the settlor, shortly before engaging in a hazardous *trade*, settled by a post-nuptial settlement the great bulk of his property upon his wife, himself, and children. Nine months after this, he became bankrupt. No debt was still owing which had been incurred before the date of the settlement.

(*a*) *Holmes* v. *Penney*, 3 K. & J. at p. 100.

(*b*) Per Sir William Fortescue in *Taylor* v. *Jones*, 2 Atk. 600.

(*c*) *Kidney* v. *Coussmaker*, 12 Ves. 136; and *Montague* v. *Sandwich*, there cited pp. 148, n., 155, n.; see ante, p. 63.

(*d*) 2 Atk. 481; and see *Townshend* v. *Windham*, 2 Ves. 11, et supra.

(*e*) 2 Atk. 481.

(*f*) L. R. 14 Eq. 106, 122; ante pp. 51 et seq.

It was held by Sir R. Malins, V.C., that the settlement was fraudulent and void, because it was made with a view to a state of things in which the settlor might become indebted at a future *time. That [*66] was upon the broad ground that a man who contemplated going into trade could not, on the eve of doing so, take the bulk of his property out of the reach of those who might become his creditors in his trading operations (*f*).

Ex parte Russell.

So in *Ex parte Russell* (*g*) where a *trader*, indebted but not insolvent at the time, settled substantially the whole of his property on his wife and children before going into a new trade, it was held, following *Mackay* v. *Douglas* (*h*), that the settlement was void, because its object was to screen his wife and children from the risks of the unknown adventure, and to preserve his property from his future creditors.

Marks of fraud—
1. Generality of the conveyance.

One thing noticed by Lord Hardwicke in the case of *Stileman* v. *Ashdown* has since then been frequently regarded as a mark of fraud against *future* creditors. He there said, "What can be more favourable for the plaintiff than that every foot of the estate has been covered by these purchases? And unless I let him in upon these estates, the plaintiff has no possibility of being paid."

Ware v. *Gardner.*

In *Ware* v. *Gardner* (*i*) the generality of the gift was considered a badge of fraud. In that case the settlor was in trade, and by a post-nuptial settlement conveyed to trustees on trusts for his wife and children *all* his property, as well present as future. He continued to trade, and became bankrupt five years afterwards. Lord Justice James, then Sir W. M. James, V.C., said the question was whether by this deed he could have had any other intent than to delay and hinder his creditors? and held that he did execute it with that intent, and that it was within the very words of the statute 13 Eliz. c. 5 (*k*).

(*f*) See *In re Pearson*, 3 Ch. D. 807.
(*g*) 19 Ch. D. 588.
(*h*) L. R. 14 Eq. 106; post, pp. 520, 521. The same is the law in America, and Upper Canada: see ante, p. 53.
(*i*) L. R. 7 Eq. 317.
(*k*) See also *Henderson* v. *Lloyd*, 3 F. & F. 7; and so by the civil law: see Dig. lib. 42, tit. 8, par. 17, sec. 1.

Indeed, where a man about to contract debts denudes himself of all his property by a voluntary gift, the inference of a fraudulent intention is irresistible (*l*), for a [* 67] man has a no right by a mere *act of bounty to put himself in such a position that he cannot meet the just demands on him (*m*).

2. Continuance in possession.

The case of *Stileman* v. *Ashdown* (*n*) may be considered an authority for supposing that, even where the property conveyed is real estate, the donor's continuance in possession is a mark of fraud against subsequent creditors. It was there said that if the father had taken an estate for life with remainder to the son in fee it would clearly be bad against the creditors. Subsequent decision has not upheld this as a general proposition, but it would be difficult to support even against subsequent creditors, a voluntary deed retained by a settlor who also kept possession of the property till his death (*o*). If the retainer of possession will sometimes make a conveyance for value void (*p*), à fortiori will it tend to vitiate a voluntary alienation: for a deed not fraudulent in itself at its execution may become so afterwards by being made use of in a manner prejudicial to the rights of creditors, and the settlor's retaining possession of the settled property has been held to have this effect (*q*).

But this does not militate against the leading principle above adverted to (*r*), that under the statute 13 Eliz. c. 5, the fraud, if at all, must be taken to have

(*l*) See *Freeman* v. *Pope*, L. R. 5 Ch. 538, 541, 545; *In re Ridler*, 22 Ch. D. 80; supra, p. 47.

(*m*) *Cornish* v. *Clark*, L. R. 14 Eq. 184; *Ex parte Bolland*, L. R. 17 Eq. 115; ante, pp. 38, 51.

(*n*) 2 Atk. 481.

(*o*) See *Ward* v. *Lant*, Prec. Ch. 182; *Loeffes* v. *Lewen*, Prec. Ch. 370; *Drakeford* v. *Wilks*, 3 Atk. 539–40; *Boughton* v. *Boughton*, 1 Atk. 625. For then the property settled is, at the settlor's death, assets in his executor's hands; see post, p. 69; and see *Bates* v. *Graves*, 2 Ves. Jun. 292, where Lord Loughborough said, "There is, as to third parties, no change of ownership without possession." A debt on a voluntary bond, covenant, or promissory note is always postponed to creditors for value, at the death of the obligor, covenantor, or promisor; see *Watson* v. *Parker*, 6 Beav. 283; *Fletcher* v. *Fletcher*, 4 Hare, 67; *Blount* v. *Doughty*, 3 Atk. 481; *Goldicutt* v. *Townsend*, 28 Beav. 445; *Lomas* v. *Wright*, 2 My. & K. 769. See post, p. 398.

(*p*) See post, pp. 113 et seq.

(*q*) *Stone* v. *Grubham*, 2 Bulstrode, 225; *Hungerford* v. *Earle*, 2 Vern. 261; *Russell* v. *Hammond*, 1 Atk. 13, 16; *Stileman* v. *Ashdown*, 2 Atk. 481.

(*r*) Ante, pp. 15, 35.

existed in the settlor's mind *at the time* he made the settlement; for he is presumed to have had in view a subsequent fraudulent use of the deed when he executed it (*s*).

Where fraudulent intent, indebtedness before the deed immaterial.

Where the contrivance or fraudulent intention appears there is *no need to shew that there were [* 68] creditors existing at the time; it is enough if any creditor, whether existing before or after the transaction, is or may be defeated (*t*). So, in *In re Pearson* (*u*), a man not then a trader, and owing no debts at the time, made a voluntary settlement of £1000 in 1858. The trusts of the settlement were *a life estate to the settlor determinable on his bankruptcy*, then a life estate to his wife for her separate use, then trusts for their children, with the ultimate remainder to the settlor. Fifteen years after, in 1873, he engaged in trade for the first time, and in 1875 became a bankrupt. It was held by Sir J. Bacon, V.C., that the settlement was plainly fraudulent upon the face of it, because it was an attempt to deal with his property so as to put it out of the reach of possible creditors. This decision seems to proceed on the ground that the settlement was in reality a sham, by reserving to the settlor the first life estate, *determinable on bankruptcy*. For, if the trusts had been solely or primarily for the benefit of his wife and children, inasmuch as it was not proved that the settlor then contemplated going into trade fifteen years after, the settlement, it is conceived, would have been held valid (*v*).

In re Pearson.

Fraudulent conveyance void *only* as against creditors.

A conveyance which is void against creditors within the statute is, when set aside, void only as against all the creditors of the settlor. It was said by Sir William Grant, M.R., in *Curtis* v. *Price* (*w*): "A settlement of this kind (that is, a voluntary settlement) is void only as against creditors; but only to the extent in which it may be necessary to deal with the estate for their satisfaction, it is as if it had never been made. To every

(*s*) See *Freeman* v. *Pope*, L. R. 5 Ch. 538; *Crossley* v. *Elworthy*, L. R. 12 Eq. 158; *Mackay* v. *Douglas*, L. R. 14 Eq. 106; *Ex parte Russell*, 19 Ch. D. 588.

(*t*) *Graham* v. *Furber*, 14 C. B. 410.

(*u*) 3 Ch. D. 807: and as to the Scotch law, see *Learmouth* v. *Miller*, L. R. 2 H. L. Sc. 438.

(*v*) See *Mackay* v. *Douglas*, L. R. 14 Eq. at p. 121; *In re Cross*, 19 W. R. 153.

(*w*) 12 Ves. 103, 106; *Smith* v. *Cherrill*, L. R. 4 Eq. 390; *Tanqueray* v. *Bowles*, L. R. 14 Eq. at p. 157.

other purpose it is good. Satisfy the creditors, and the settlement stands." So it was said by Lord Cranworth, L.C., in *French* v. *French* (*y*): "In my opinion, if at any time hereafter the assets of the testator should be realized and found more than sufficient to meet all his liabilities, this Court would find the means of restoring the settlement and giving Mrs. French the benefit intended to be conferred upon her." It is believed that this point has never been expressly decided (*y*).

Same in America.

[* 69] * The same principle, that a voluntary conveyance is good except as against creditors, and, when, void against them, only disturbed so far as is necessary in order to satisfy their claims, obtains in America (*z*).

The property so alienated is assets for alienator's creditors after his death.

So where a man makes a gift of goods which is fraudulent and void against his creditors, and dies, he is considered to have died in full possession with respect to the claim of the creditors, and the goods are just as much assets in the hands of his personal representative, as to creditors, but as to creditors only (*a*), as if no attempt to alienate them had been made (*b*). Thus, where A., being indebted to B., made C. his executor, and died; and C., the executor, promised B., on good consideration, that if he could discover any goods parcel of the testator's estate at the time of his death, he should have his debts satisfied thereout; and the question was, whether a lease for years conveyed to a stranger by the testator in his lifetime fraudulently, should, in law, be parcel of his estate at the time of his death or not, it was by the whole Court resolved to be parcel of the testator's estate at the time of his death, for the estate was *void* against creditors (*c*). So that the rule applies equally where the property consists of chattels real.

And as such a transfer is void at law the property becomes, at the death of the transferor, legal—and not

(*y*) 6 De G. M. & G. at p. 103.

(*z*) Story, Eq. Jur. 12th ed. ss. 371, 381; Bump. Fr. Conv. (Amer.), 2nd ed. 315, 481, 482.

(*a*) *Curtis* v. *Price*, 12 Ves. 89; *French* v. *French*, 6 De G. M & G. 95; *Cornish* v. *Clark*, L. R. 14 Eq. 184.

(*b*) *Shears* v. *Rogers*, 3 B. & Ad. 362; *O'Connor* v. *Bernard*, 2 Jo. Ir. Rep. 654, 694, et seq.; and so as to conveyances void under 16 Ed. 4, c. 9; see Cary's Rep. 25; Vin. Abr. tit. Fraud (F.), pl. 2.

(*c*) *Anonymous Case*, 2 Roll. Rep. 173; *Kitchin* v. *Dixson*, Gouldsb. 116, pl. 12.

merely equitable—assets for creditors; for, the deed being treated as respects the creditors as if it had never existed, the property comes to the executor virtute officii (*d*).

And fraudulent grantee taking possession is executor de son tort.

As any intermeddling with a testator's effects makes the person so doing an executor de son tort (*e*), and as goods fraudulently alienated by a testator in his lifetime remain part of his estate at his death, possession taken by the fraudulent grantee will make him executor de son tort (*f*); and he will be liable to be sued as * such if not the rightful executor, and a hus- [* 70] band may in this way become executor de son tort of his wife, who, being sole, has made a covinous gift of goods (*g*).

But the fraudulent alienation is good against the rightful executor or administrator, for he is not a creditor, nor does he represent creditors, and therefore it is no devastavit for him to deliver the goods to the fraudulent grantee, who can be sued for them by creditors, but not by any other person (*h*).

Does this apply where the possession was actually changed?

It must be observed that all these are cases where the donor has, consistently or inconsistently (*i*) with the deed, remained in actual possession of the property until his death. And it is apprehended the principle would not apply where the donor had in his lifetime made an absolute immediate gift, followed by change of possession, so as to put the property out of his own power (*k*).

Marks of fraud—

It is a circumstance inducing strong suspicion of fraud for a man to make a voluntary settlement, knowing at the time that he will shortly become indebted (*l*).

(*d*) *Shee* v. *French*, 3 Drew. 716.

(*e*) *Padget* v. *Priest*, 2 T. R. 97, 100.

(*f*) 2 Bac. Abr. 605; *Hawes* v. *Leader*, Cro. Jac. 271; *Edwards* v. *Harben*, 2 T. R. 587; *Shears* v. *Rogers*, 3 B. & Ad. 362; Rob. Fraud. Conv. 593; *Shee* v. *French*, 3 Drew. 716.

(*g*) *Wilcocks* v. *Watson*, 1 Cro. Eliz. 405.

(*h*) *Hawes* v. *Leader*, Cro. Jac. 271; *Orlabar* v. *Harwar*, Comb. 348; Vin. Abr. tit. Fraud (C.), pl. 12, p. 518.

(*i*) See *O'Connor* v. *Bernard*, 2 Jo. Ir. Rep. 654, where there was a conveyance to a daughter in fee; the land was taken under a sequestration, and the daughter set up no claim to it until her father's death.

(*k*) See also on this point *Watts* v. *Thomas*, 2 P. Wms. 364.

(*l*) *Walker*, v. *Burrows*, 1 Atk. 93, 94; *Richardson* v. *Smallwood*, Jac. 552; *Ware* v. *Gardner*, L. R. 7 Eq. 317; and see *In re Ridler*, 22 Ch. D. 74.

3. Voluntary conveyance pendente lite.

Thus a voluntary conveyance pendente lite, or by a person against whom an action for damages, &c, or writ in Chancery (*m*) is pending, and which he must have known would probably go against him, is always open to the imputation of fraud (*n*), though at the time of the settlement he was not in debt.

So where a man knows that a decision is about to be pronounced against him, and thereupon settles all his property, this comes within the exact words of the statute (*o*).

This, however, does not necessarily apply if the pre- [* 71] ceding * action for damages is of a very speculative character, so that the probability of substantial damages is very slight (*p*).

Where a man made misrepresentations shortly before executing a voluntary settlement for which he was afterwards made liable in damages, it was held that the misrepresentations related back, so as to prove him to have been then indebted; and that it was at least a circumstance of suspicion, even if not enough to invalidate it (*q*).

To avoid forfeiture for felony.

The word "forfeitures" in the statute extends to every kind of forfeiture to the sovereign or a subject (*r*), and it has frequently been held that if a man alien his lands with intent to commit a forfeiture, and afterwards commits a felony, the lands shall be forfeited as if there had been no alienation (*s*), and if the alienation is voluntary and the felony follows immediately, a fraudulent intention will be presumed (*t*); and where the alienation is voluntary, and no possession is given under it, and there appears to be a trust for the benefit of the donor, it will be void against a subsequent forfeiture, though not happening immediately afterwards (*u*). A

(*m*) *Self* v. *Madox*, 1 Vern. 459; *Partridge* v. *Gopp*, 2 Amb. 596; but see *Ex parte Mercer*, 17 Q. B. D. 290; post, pp. 74, 521.
(*n*) *Anonymous Case*, Dyer, 294, b; Rob. Fraud. Conv. 575; *King* v. *Marissal*, 3 Atk. 192.
(*o*) *Barling* v. *Bishopp*, 29 Beav. 417; *Reese River Silver Mining Co.* v. *Atwell*, L. R. 7 Eq. 347.
(*p*) *Ex parte Mercer*, 17 Q. B. D. 290.
(*q*) *Crosley* v. *Elworthy*, L. R. 12 Eq. 168, 169; but see *Ex parte, Mercer* 17 Q. B. D., per Grantham, J.. 296, 297.
(*r*) *Pauncefoot* v. *Blunt*, 3 Rep. 82 a; post, p. 169.
(*s*) Roll. Abr. 34.
(*t*) Vin. Abr. tit. Fraud (A.) 1; *Jones* v. *Ashurt*, Skin. 357.
(*u*) *Sir W. Raleigh's Case*, cited in *Rex* v. *Nottingham*, Lane 48.

conveyance on the eve of conviction must be supported by proof of consideration (*v*); but where a clerk who had robbed his employers, a banking company, of a large sum of money, before conviction, deposited title-deeds of real estate as security as far as they would extend for the money taken, it was held, after he had been sued to conviction by the company, that the money taken was a debt due from a felon to the company, and a good consideration for the securities given to the company by him; and consequently, as the deposit was not a voluntary gift by him, it was good against the Crown (*w*). And where a mortgage was made with the intention on the part of the *mortgagor of defeating a [* 72] verdict for damages, it was held that the plaintiff could only redeem the mortgage (*x*).

It is conceived that, since forfeiture for felony has been abolished (*y*), a conveyance which previously would have been held void against the Crown will now be held void against the administrator appointed by the Crown.

Voluntary conveyance to defeat execution void.

Though a conveyance for valuable consideration is not void merely because it is made with the intention of defeating a particular execution (*z*), yet even by the common law a *voluntary* alienation made with that object was void (*a*), and of course is so, under the statute, both at law and in equity (*b*).

Spencer v. *Slater*.

In *Spencer* v. *Slater* (*c*) an insolvent debtor assigned all his property to trustees upon trust to carry on the business or realize it and to pay his creditors on certain

(*v*) *Shaw* v. *Bean*, 1 Stark. 319. See also *Lenthal's Case*, 2 Vern. 44; *Turvil* v. *Tipper*, Latch. 222; *Jones* v. *Winwood*, 10 Sim. 150; *Rex* v. *Bridger*, 1 M. & W. 145; *Leonard* v. *Bacon*, Cro. Eliz. 234; *Moorewood and Wilkes*, 6 C. & P. 144; *Saunders* v. *Wharton*, 1 N. R. 256; *Perkins* v. *Bradley*, 1 Hare, 219; *Manning* v. *Gill*, L. R. 13 Eq. 485.

(*w*) *Chawne* v. *Baylis*, 31 Beav. 351.

(*x*) *King* v. *Marissal*, 3 Atk. 192.

(*y*) 33 & 34 Vict. c. 23.

(*z*) *Alton* v. *Harrison*, L. R. 4 Ch. 622; *Wood* v. *Dixie*, 7 Q. B. 892, post, pp. 99, 100 et seq.; *Ex parte Games*, 12 Ch. D. 314.

(*a*) Dyer, 295 a.

(*b*) *Bott* v. *Smith*, 21 Beav. 511; *Blenkinsopp* v. *Blenkinsopp*, 12 Beav. 568, S. C, 1 De G. M. & G. 495; *Barling* v. *Bishopp*, 29 Beav. 417; *Reese River Silver Mining Co.* v. *Atwell*, L. R. 7 Eq. 347; *Hale* v. *Metropolitan, &c. Co.*, 4 Drew. 492; post, p. 99.

(*c*) 4 Q. B. D. 13; but see *Boldero* v. *London and Westminster Discount Co.*, 5 Ex. D. 47; *Ex parte Chaplin*, 26 Ch. D. 319; post, pp. 97, 98.

conditions specified in the deed. The debtor executed the deed for the purpose of defeating an apprehended execution, and also for the purposes specified in the deed. It was held that the assignment was void because the purposes specified in the deed, including the power to the trustees to carry on the business, tended to delay creditors, and also because the deed contained a resulting trust in favour of the debtor.

Or to defeat sequestration.

And it is the same with respect to conveyances to defeat sequestration: if made on good and valuable consideration they are valid (*d*), but a mere voluntary settlement or conveyance for the purpose of defeating an expected sequestration is clearly void (*e*); so that where a husband, pending proceedings against him in the Ecclesiastical Court for a divorce, executed a voluntary settlement of real and personal estate for the purpose of [* 73] defeating *any process in the nature of execution, and sequestration afterwards issued against him, the deed was held void as against the wife (*f*); and the mere fact of value being paid will not necessarily make it good against the sequestrator (*g*), and a grossly inadequate consideration is of no use (*h*).

Or to defeat a debt shortly to fall due.

A voluntary conveyance by a person who knows that he will shortly become indebted, comes under the same category. Of this nature was the case of *Spirett* v. *Willows* (*i*), as explained by Lord Hatherley in *Freeman* v. *Pope*, (*k*), where he said that in *Spirett* v. *Willows* the settlor being solvent at the time, but having contracted a considerable debt which would fall due in the course of a few weeks, made a voluntary settlement by which he withdrew a large portion of his property for the payment of debts, after which he collected the rest of the assets and (apparently in the most reckless and profligate manner) spent them, thus depriving the expectant creditor of the means of being paid. In that case there was clear and plain evidence of an actual intention to defeat creditors. But it is

(*d*) *Coulston* v. *Gardiner*, 3 Sw. 279, n.; *Alton* v. *Harrison*, L. R. 4 Ch. 622.

(*e*) *Witham* v. *Bland*, 3 Sw. 276, n.; *Coulston* v. *Gardiner*, 3 Sw. 279, n.; *O'Connor* v. *Bernard*, 2 Jo. Ir. 654.

(*f*) *Blenkinsopp* v. *Blenkinsopp*, 12 Beav. 568, S. C. 1 De G. M. & G. 495; post, p. 526.

(*g*) *Empringham* v. *Short*, 3 Hare, 461.

(*h*) *Strong* v. *Strong*, 18 Beav. 408.

(*i*) 3 D. J. & S. 293.

(*k*) L. R. 9 Eq. 206, S. C. L. R. 5 Ch. 538, 541.

established by the authorities that if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute (*l*).

Or to defeat contingent liability.

So a voluntary settlement by a person then under a large contingent liability as guarantee for a debt, which, as a reasonable man, he should expect would probably be enforced, and to meet which liability he had left substantially no available assets out of settlement, is within the statute (*m*).

Fraud against *future* creditors.

The question, what fraud avoids a voluntary deed as against * subsequent creditors, was much dis- [* 74] cussed in *Barling* v. *Bishopp*, (*n*), where, after notice of trial in an action of trespass, the defendant had executed a voluntary conveyance of real estate to his daughter, and a verdict being given against him he became insolvent, and the plaintiff in the action filed his bill in Chancery to set aside the voluntary conveyance. No debt was due from the defendant at the date of the settlement, but after its execution he kept the title-deeds and remained in possession of the property, just as before the deed was executed. Lord Romilly, M.R., said, "It is obvious that the statute is not in terms restricted to existing creditors alone, but that it extends to future creditors also;" and after referring with approval, to *Jenkyn* v. *Vaughan* (*o*), observed that there are many modes by which a person may be hindered of his just and lawful actions, debts, and damages, and by which creditors may be defrauded, although the grantor may not be indebted at the time; a man not indebted and of good credit may make a conveyance of property to his son or daughter, and immediately after borrow a large sum of money, and, having spent or made away with it take the benefit of the Act; that, if this is done

(*l*) Ante, p. 47.
(*m*) *In re Ridler*, 22 Ch. D. 74, 82; but see *Ex parte Mercer*, 17 Q. B. D. 290.
(*n*) 29 Beav. 417, approved *Ex parte Mercer*, 17 Q. B. D. 295, 296.
(*o*) 3 Drew. 419.

simultaneously, it would be impossible to say that it was not done with intent to defraud his creditors; a tenant might strip the lead off his house, having the day before made a voluntary conveyance, take the benefit of the Act, and then say, "I have nothing to pay the damages;" and that the only thing the Court has to consider in such a case as this is, whether the object was to defeat the creditors, present or future.

Ex parte Mercer.

This principle has been qualified in the recent case of *Ex parte Mercer*, (*p*), decided by the Divisional Court and affirmed by the Court of Appeal.

In that case a man not in trade, and at that time absolutely free from debt, made a voluntary post-nuptial settlement of a legacy of £500 which had just before unexpectedly accrued to him, being, in fact all he had, and directly after he had been served with a writ in an action for breach of promise of marriage. Judgment was obtained against him in the action for £500 damages. He was afterward adjudicated a bankrupt.

[* 75] *It was held that having regard to all the circumstances of the case, to the highly speculative nature of the action against him, to the fact that at the time he was subject merely to a liability which might or might not result in a debt, it could not be said that the necessary effect of the settlement was to defeat or delay his creditors, or that the settlor at the time he executed it had any such actual intention.

Express fraudulent intent necessary.

There must, however, be an express intent to defraud future creditors (*q*); the fact of there being no reasonable cause or explanation why at that time such a settlement should have been made is always looked on as a suspicious circumstances, pointing to the expectation of future indebtedness as a motive. (*r*).

So a settlement by a trader of all his property, present or future, although not then in debt, except for money secured by mortgages since paid off, was held within the statute (*s*).

(*p*) 17 Q. B. D. 290.
(*r*) *Richardson* v. *Smallwood*, Jac. 557; *Goldsmith* v. *Russell*, 5 De G. M. & G. 547, 554; post, pp. 520, 521.
(*s*) *Ware* v. *Gardner*, L. R. 7 Eq. 317; *In re Pearson*, 3 Ch. D. 807; ante, pp. 66, 68.

Engaging in *trade* soon after settlement.

One important class of cases within the statute is, where the settlor contemplates entering on a new trade, or going into trade. In this case, a settlement, even if the settlor is not indebted at the time, will be held fraudulent and void, because it takes his property out of the reach of those who might be his creditors at a future time (*t*).

Need not be shewn by any acts or words.

It is established that it is not necessary to shew the express intent to defraud future creditors by anything said or done; but if, having regard to *all* his circumstances and position, a man makes a settlement, the effect of which would necessarily be to delay or defeat those creditors, it is within the statute (*u*).

A voluntary settlement, then, of real or personal property to be good against subsequent creditors, must be made by a person not indebted at the time, and "not meaning a fraud" (*v*).

Some benefit under the settlement given to settlor.

* Where a voluntary settlor has bonâ fide parted with all the control over the property settled, the mere fact that he has vested it in trustees with absolute power to deal as they please with the income for the benefit of himself and his wife and children, will not make it fraudulent against subsequent creditors of the settlor any more than if it were a settlement simply for the benefit of the wife and children of the settlor. The distinction is too thin to authorize the Court to decide that, because the settlor may possibly derive some benefit from it, the settlement must therefore be fraudulent. But the settlement being merely voluntary, the intention may have been to take the property from the creditors, and it may be requisite to have the transaction fully investigated (*w*). [* 76]

So a voluntary settlement in which there is a trust

(*t*) *Crossley* v. *Elworthy*, L. R. 12 Eq. 158; *Mackay* v. *Douglas*, L. R. 14 Eq. 106; *Taylor* v. *Coenen*, 1 Ch. D. 636; *Ex parte Russell*, 19 Ch. D. 588; *Ex parte Mercer*, 17 Q. B. D., per Cave, J., 293; ante, pp. 51, 65; post, p. 521.

(*u*) *Jenkyn* v. *Vaughan*, 3 Drew. 419; *Freeman* v. *Pope*, L. R. 5 Ch., per Lord Hatherley, 538, 541; *In re Maddeson*, 27 Ch. D., per North, J., 526; but see *Ex parte Mercer*, 17 Q. B. D. 290; ante, p. 74.

(*v*) *Holloway* v. *Millard*, 1 Mad. 414, 421; *Mackay* v. *Douglas*, L. R. 14 Eq. 121; *Kent* v. *Riley* L. R. 14 Eq. 184; post, p. 520.

(*w*) Per Lord Hatherley (then Sir W. P. Wood, V.C.) in *Holmes* v. *Penney* 3 K. & J. at p. 100; *In re Cross*, 19 W. R. 153; *In re Pearson*, 3 Ch. D. 807.

for the division of the income at the sole discretion of the trustees, to take effect on the bankruptcy of the settlor by divesting his life estate, will not of itself make the settlement fraudulent against subsequent creditors (*x*).

Powers of revocation.

A power of revocation is a strong mark of fraud against future creditors, and will, it is apprehended, always make a settlement void against them; for it virtually leaves the property under the settlor's power, shewing that he did not bonâ fide intend to put the property out of his reach (*y*), and that it was a contrivance for his own benefit (*z*); but actual notice to a creditor before he became so has been held to make a difference in favour of the deed (*a*).

Conveyances purely voluntary treated the same as those on meritorious consideration.

There seems to have been at one time an impression that, though the consideration of natural affection in a settlement by a man on his wife or children would be sufficient to support that settlement against subsequent creditors, and, unless made with a fraudulent intention, [* 77] came within the proviso in favour of *conveyances on *good* consideration and bonâ fide, yet a voluntary conveyance to or settlement on mere strangers, not resting on such meritorious consideration, would be void, even against subsequent creditors, though made without meaning a fraud on subsequent creditors (*b*); but there seems to be no shadow of ground for this distinction at the present day; conveyances merely voluntary and those which are founded on the consideration of natural affection must stand or fall by the same rule in all cases (*c*).

Not so in America.

In America, however, a voluntary conveyance in favour of a wife or children cannot be impeached by subsequent creditors merely because it is voluntary (*d*).

(*x*) *In re Kerrison's Trusts*, L. R. 12 Eq. 422.

(*y*) See *Hungerford* v. *Earle*, 2 Vern. 261; *Tarback* v. *Marbury*. 2 Vern. 510; Gilb. Lex P. 293; *O'Connor* v. *Bernard*, 2 Jo. Ir. Rep. 654; *Smith* v. *Hurst*, 10 Hare, 44.

(*z*) *Alton* v. *Harrison*. L. R. 4 Ch. 626; post, pp. 96, 97; and see Bump. Fr. Conv. (Amer.), 2nd ed. 317-318.

(*a*) *Sagitary* v. *Hide*, 2 Vern. 44.

(*b*) See *Tyre* v. *Littleton*, 2 Brownl. 189; Rob. Fraudulent Conv. 448; and see per Lord Hardwicke, in *Townshend* v. *Windham*, 2 Ves. 11; ante, p. 15; post, pp. 245, 246.

(*c*) *Holloway* v. *Millard*, 1 Mad. 414, 418; post, p. 245.

(*d*) *Sedgwick* v. *Place*, 25 L. T. (N.S.) (Amer.) 307.

CONVEYANCES FOR VALUE AS AGAINST CREDITORS.

Proviso in favour of bonâ fide purchasers without notice of fraud.

By the 6th section (*e*) it is provided that the Act shall not extend to any estate or interest *upon good consideration and bonâ fide* lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having, at the time of such conveyance or assurance to them made, any manner of notice (*f*) or knowledge of such covin, fraud, or collusion.

Volunteers need not have notice.

But if conveyance for value purchaser must have notice,

and also vendor to avoid deed.

In cases of voluntary gifts it matters not whether or not the volunteers had notice of the fraud (*g*), but where there has been a conveyance for value, not only must fraud be shown, but in order to avoid the transaction as against the purchaser it must be shewn that he was privy to the fraud against creditors. Unless this position can be established, the purchaser who has paid his money or other consideration has a right paramount to that of creditors (*h*). The question, where the conveyance is for value, is, whether there was an intent to defraud creditors in the parties to the deed. "I say in the *parties* to the deed, because it appears to me to be plain that whatever fraudulent intent there may have been in the mind of Judith Johnson (the vendor), it would not avoid the deed, unless it was shewn to have been concurred in by Alice, who became the purchaser under the deed. It has not been contended, and it could not be contended, that the mere fraudulent intent of the vendor could avoid the deed, if the purchaser were free from that fraud" (*i*).

(*e*) See Appendix No. I.

(*f*) As to whether notice to the purchaser's solicitor is enough, see *Re Colemere*, L. R. 1 Ch. 128, 133; *Rorke's Estate*, 14 Ir. Ch. Rep. 442; *Sykes* v. *Bond*, 7 Jur. (N.S.) 1024; *Sharpe* v. *Foy*, 17 W. R. 65. Notice to solicitors of trustees is not notice to the trustees · *Saffron Walden Second Benefit Building Society* v. *Rayner*, 14 Ch. D. 406; and see *Cave* v. *Cave*, 15 Ch. D. 639.

(*g*) Ante, p. 45.

(*h*) It is different as to frauds under the bankruptcy laws: see *Colombine* v. *Penhall*, 1 Sm. & Giff. 228, 257; *Bulmer* v. *Hunter*, L. R. 8 Eq. 46.

(*i*) *In re Johnson*, 20 Ch. D., per Fry, J., 394; post, p. 62. The same is the law in Upper Canada: *Wood* v. *Irwin*, 16 Chy. 398, S. C. 18 Chy. 594.

Notice must be of the fraud itself.

[* 79] * And the purchaser must have notice not only of the debt but of the covin (*k*)—of the fraudulent intention; for if mere notice of debts were sufficient to avoid a sale otherwise honest a purchaser ought to have, not only an abstract of the vendor's title, but an abstract of the vendor's circumstances; and he must be examined like a bankrupt; a conveyance, therefore, cannot be invalidated under this Act where there is a bonâ fide purchaser (*l*). So where a marriage settlement is impeached by creditors of the husband, the wife—who is a purchaser for value by the marriage—must be proved to have been privy to the fraud (*m*).

Upton v. *Basset.*

This was the original intention of the statute, limiting its operation to the evils to be avoided; in *Upton* v. *Basset* (*n*) Owen, J., said "he was at the making of the statute, wherein special care was taken that there should not be any words which should extend to purchasers." Where there is a bonâ fide purchase, and in the same transaction a dealing with the property or the purchase-money by the vendor of such a nature as to be fraudulent against his creditors, *that* may be set aside without affecting the validity of the sale, although the two transactions were effected by one deed (*o*).

Purchase and fraudulent settlement by one transaction.

Innocent third parties to be protected;

As was observed by Lord Mansfield (*p*) on this proviso, the statute directs that no act whatever done to defraud a creditor or creditors shall be of any effect against such creditor or creditors. But then such a construction is not to be made in favour of creditors as will make third persons sufferers. Therefore the stat-

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(*k*) Per Eyre, Baron, in *Jones* v. *Boulter*, 1 Cox, 288–295, and so by the civil law, Dig. lib. 42, tit. 8, par. 10, secs. 2, 4; *Bulmer* v. *Hunter*, L. R. 8 Eq. 46; *Kevan* v. *Crawford*, 6 Ch. D. 29; *In re Johnson*, 20 Ch. D. 389, S. C. 51 L. J. (N.S.) Ch. 503; et ante, p. 8.

(*l*) Per Sir T. Plumer, in *Copis* v. *Middleton*, 2 Mad. 410, 426; and see *French* v. *French*, 6 De G. M. & G. 95, 101–2; *Hale* v. *Metropolitan Saloon Co.*, 4 Drew. 492; and *In re Johnson*, 20 Ch. D. 389, S. C. 51 L.J. (N.S.) Ch. 503.

(*m*) See *Fraser* v. *Thompson*, 1 Giff. 49, 63; *Bulmer* v. *Hunter*, L. R. 8 Eq. 50, 51; *Kevan* v. *Crawford*, 6 Ch. D., per Jessel, M. R., 39; post, pp. 91 et seq.

(*n*) Cro. Eliz. 444, as quoted by Sir T. Plumer in *Copis* v. *Middleton*, 2 Mad. 430. But it is submitted that the statute referred to was the 27 Eliz. c. 4, not the 13 Eliz. c. 5.

(*o*) *Goldsmith* v. *Russell*, 5 De G. M. & G. 547, 554; *French* v. *French*, 6 De G. M. & G. 95; *Neale* v. *Day*, 28 L. J. (N.S.) Ch. 45; *Wakefield* v. *Gibbon*, 1 Giff. 401.

(*p*) In *Cadogan* v. *Kennett*, Cowp. 435.

ute does not militate against any transaction bonâ fide and where there is no imagination of fraud.

* A bonâ fide purchaser, without notice of [* 80] any fraud on creditors, is more entitled to be protected than the creditors themselves, whose only claim is on the general estate ; for he has paid his money for the particular estate which he claims (*q*), and is expressly exempted from the operation of the Act by this section ; and even though there are some suspicious circumstances, a purchase will be held good unless it is shewn that it was a contrivance to defeat creditors and that the purchaser was privy to it (*r*). more than creditors themselves.

The operation of the statute is bounded, on the one side by the danger of allowing persons unfairly to reduce the fund to which creditors have a right to look for the payment of their debts, by giving away that over which they have only a qualified, not an absolute, right, being allowed to sell, not to give ; or of allowing collusive sales, equally injurious to creditors. And, on the other hand, the Court (especially with regard to dispositions on valuable consideration) will not carry its decisions in favour of creditors so far as to cramp the dealings of innocent persons with those who may be infringing the rights of their creditors. Too great an extension of principle in either of these directions would be promoting the mischief intended to be remedied, and would go to prevent "all dealing, bargaining, and chevisance between man and man" (*s*), and counteract the object of the statute (*t*). Limits of the beneficial operation of the statute. To protect creditors. But not so as to touch innocent persons.

For as, on the one hand, mutual credit and confidence, so necessary and indispensable for the advancement of commerce and trade, are strengthened in the proportion that the power of debtors to evade payment is decreased ; so, on the other hand, a purchaser cannot be expected to know or inquire into the state of the vendor's circumstances ; and nothing but injustice and mistrust between man and man could be occasioned by making void sales to an innocent purchaser. Such Mutual credit increased by security of creditors. But innocent purchasers must be equally protected.

(*q*) *George* v. *Milbanke*, 9 Ves. 190, 196 ; post, p. 230.
(*r*) *Hale* v. *Metropolitan Saloon Omnibus Co.*, 4 Drew. 492 ; *Harman* v. *Richards*, 10 Hare, 81, 89 ; *Holmes* v. *Penney*, 3 K. & J. 90 ; *Kevan* v. *Crawford*, 6 Ch. D. 29 ; *In re Johnson*, 20 Ch. D 389, S. C. 51 L. J. (N.S.) Ch. 503.
(*s*) 13 Eliz. c. 5, s. 1 ; Appendix No.
(*t*) *Copis* v. *Middleton*, 2 Mad. 427, 428.

sales are, in another view, also beyond the mischief of [* 81] the statute; for where a fair * price is paid for land or goods the property of the debtor is not by that act made less, or less available (*u*), to creditors. The purchase-money or other price paid remains subject to their demands; and if they allow the debtor to spend or make away with it (*v*) it is their own fault that they did not proceed against him (*w*); and, having stood by and allowed him to do so, they cannot afterwards compel the innocent purchaser to make good that which has been lost through their own laches.

Copis v. *Middleton.*

This is well illustrated by the case of *Copis* v. *Middleton* (*x*), in which creditors sued to set aside a sale, by an uncle to his nephew, of an estate which had been let to the nephew's father and mother for a considerable time, and had been improved and put into repair by them. The plaintiffs relied upon relationship, the inadequacy of price, and the insolvency of the uncle at the time of the sale. Sir T. Plumer held, first, that there is no fraud in selling to a relation. If, on account of his relationship, he sold it for less than he would have done to another, that might be material; but if he treated with him as he would have done with a stranger, the contract was valid (*y*). Secondly, the inadequacy of price was not clearly shewn, and would not of itself avoid the sale. And thirdly, as it was not proved that the uncle, when he sold the estate, knew that he was insolvent; and as it was proved that the nephew did *not* know it, the nephew was a bonâ fide purchaser, without having at the time of such conveyance any manner of notice of the covin, fraud, or collusion, and therefore the sale was good (*z*).

Sale to a relation.

Inadequacy of price.

Insolvency of vendor of which the purchaser did not know.

Purchaser of a settlement for third parties is within the proviso.

The benefit of this section has been extended to cases in which the purchaser, innocent of any fraud on the part of the owner of the property, has, by making a

(*u*) See *Dewey* v. *Bayntun*, 6 East, 257, 282, ante, p. 55, post, p. 87; *In re Johnson*, 20 Ch. D. 397, S. C. 51 L. J. (N.S.) Ch. 503.

(*v*) See *French* v. *French*, 6 De G. M. & G. 95, post, pp. 86. 87.

(*w*) *Copis* v. *Middleton*, 2 Mad. 430.

(*x*) 2 Mad. 410.

(*y*) But in *Moore* v. *Crofton*, 3 J. & Lat. 443, Lord St. Leonards said, "I do not admit that a man may not enter into a contract with a relation and give him better terms than he could to a mere stranger": vide post p. 246; and see *In re Johnson*, 20 Ch. D. at p. 397, S. C. 51 L. J. (N.S.) Ch. 503, supra. pp. 82, 83.

(*z*) *In re, Johnson*, 20 Ch. D. 389, S. C. 51 L. J. (N.S.) Ch. 503; *Ex parte Eyre*, 44 L. T. (N.S.) 922.

loan or payment, become * a purchaser, not for [* 82] his own benefit, but for the purpose of inducing the settlor to settle the property on his own family (*a*).

In *Holmes* v. *Penney* (*b*), C. J. P., who was largely indebted, was entitled to a life interest in a trust fund. His brother agreed to pay all debts not charged on the life interest, on condition that such life interest should be settled so as to be applicable to the maintenance of C. J. P., his wife and children, or any of them, at the absolute discretion of the trustees. This arrangement was effected. The amount of the debts turned out to be larger than at first confessed; but the brother paid or satisfied all the debts of which C. J. P. informed him, and, as far as he could discover at the time, all that were owing, and thereupon the settlement was executed. It turned out afterwards that a debt was due to the plaintiff of which the brother knew nothing; but it was held that the settlement was valid against the plaintiff's demand. Now in this case the conduct of the settlor was not altogether free from mala fides, and the plaintiff was clearly hindered and delayed in the recovery of his debt by the settlement; but it having been established that the brother was really a purchaser, by paying the debts, of the settlement, and that he did not know anything of the plaintiff's debt, and therefore had "no manner of notice or knowledge of the covin," but had, on the contrary, done all he could to find out the whole amount of debts, the case was at once brought within the proviso and the deed held valid. *Holmes* v. *Penney.*

So a purchase of a son's reversionary interests by his father for value to enable the son to pay his debts, and in good faith, and a resettlement of those reversionary interests by the father upon the son, wife, and children, were upheld against a creditor whose debt had been unprovided for at the time of the execution of the deed, because the father was a purchaser for value in good faith, and had a right to prescribe the terms he chose (*c*). Family arrangement.

In *In re Johnson* (*d*), Judith Johnson by deed of *In re Johnson.*

(*a*) *Nunn* v. *Wilsmore*, 8 T. R. 521; *Thompson* v. *Webster*, 4 Drew. 628; *Holmes* v. *Penney*, 3 K. & J. 90; *Bayspoole* v. *Collins*, L. R. 6 Ch. 228.

(*b*) Ubi supra.

(*c*) *Ex parte Eyre*, 44 L. T. (N.S.) 922.

(*d*) 20 Ch. D. 389, S. C. 51 L. J. (N.S.) Ch. 503.

gift granted a farm and crops (being all her property) [* 83] in trust for her daughters, * in consideration of which they covenanted to pay all debts incurred by her up to the date of the deed in connection with the working and management of the said farm and to maintain her. The plaintiff was a creditor of Judith Johnson, at the date of this deed, in respect of a debt of £120 not incurred by her, but which she had taken over by giving a promissory note for the amount of it. It was said by Lord Justice Fry (then Mr. Justice Fry): "It is clear that the consideration for the deed was in part meritorious and in part valuable. . . . Now it is important to inquire what was the indebtedness of Mrs. Johnson when she executed the deed. She appears to have had some current debts, mostly, if not entirely, in respect of the farming business. . . . It appears by the evidence that Mrs. Johnson was a person of good repute among her friends as a respectable and honest woman, who paid her way and was in no difficulty. . . . The circumstances, looked at independently of the result of the deed, therefore lead me to the conclusion that the intention of the parties was to make a perfectly honest family arrangement, under which the daughters were to undertake the burden of paying their mother's debts, and, in consideration of that, to take immediately that farm which, in all probability, they would otherwise have received by will upon their mother's death. . . . It appears plain that though valuable and good consideration was given by the daughters, that consideration cannot have been the full value of the estate. But it also appears to me to be plain that when a bonâ fide and honest instrument is executed for which valuable consideration is given, and the instrument is one between relatives, the Court cannot say that the difference between the real value of the estate and the consideration given is a badge of fraud, and if it is not a badge of fraud, or evidence of an intention to defeat creditors, it has no relation to the case."

Ex post facto consideration.

It seems that it is by an extension of the protection of this section to a purchaser from a volunteer that an ex post facto consideration is allowed to make valid a conveyance which at its creation was liable to be upset by creditors or purchasers (*e*). So a voluntary bond [* 84] assigned for value becomes good against *cred-

(*e*) *Doe* v. *Martyr*, 1 B. & P. (N. R.) 332, et infra, pp. 315 et seq.

itors in the hands of the assignee, in the absence of fraud (*f*).

But, for a deed to be within this proviso, its words and intention must be fully satisfied, and, as laid down in an old case (*g*), the words "good consideration" in the statute are to be taken to mean "valuable consideration." To come within the proviso of the 6th section, a conveyance must be *both* for valuable consideration and also bonâ fide, "by which it appears that as a gift made on a good consideration, if it be not also bonâ fide, is not within the proviso, so a gift made bonâ fide, if it be not on a good consideration, is not within the proviso; but it ought to be on a good consideration, *and also* bonâ fide" (*g*).

"Good consideration" means valuable consideration.

Bonâ fides *and* good consideration.

Conveyances grounded on meritorious consideration alone (*h*), or on a consideration entirely inadequate (*i*), are looked on as voluntary; the question of what conveyances are voluntary will be elsewhere discussed (*k*).

Considerations merely meritorious or inadequate.

The subject to be discussed in this chapter is this: What conveyances are void against creditors for want of good faith, although made for a good and valuable consideration?

What conveyances void though for value.

When a deed is made for value, the question is, whether it was made *bonâ fide*; and the burden of this proof is upon those who seek to set aside the deed (*l*). The fact that there is valuable consideration shews at once that there may be purposes in the transaction other than the defeating or delaying of creditors, and renders the case, therefore, of those who contest the deed more difficult (*m*).

If deed for value, burden of proof on impeacher;

Those who seek to impeach a deed executed for valuable consideration have to prove an actual and express

(*f*) *Payne* v. *Mortimer*, 4 De G. & J. 447.

(*g*) *Twyne's Case*, 3 Rep. 80 b; *Corlett* v. *Radcliffe*, 14 Moo. P. C. 121, 135; *Middleton* v. *Pollock*, 2 Ch. D. 108; *In re Johnson* 20 Ch. D. 389, S. C. 51 L. J. (N.S.) Ch. 503.

(*h*) Ante, pp. 76, 77; post, p. 245,

(*i*) *Doe* v. *Routledge*, Cowp. 705; *Mathews* v. *Feaver*, 1 Cox, 280; *Strong* v. *Strong*, 18 Beav. 408; *Bayspoole* v. *Collins*, L. R. 6 Ch. 228.

(*k*) Post, pp. 243 et seq.

(*l*) *In re Johnson*, 51 L. J. (N.S.) Ch., per Baggallay, L. J., at p. 504.

(*m*) *In re Johnson*, 20 Ch. D., per Fry, J., 393.

and actual and express intent must be proved.

intent to defeat or delay or defraud creditors in the parties to the deed (*m*). Thus, it would not be enough [* 85] to avoid a deed for value if it could be *shewn that the result of such a deed had been to delay or exclude creditors (*n*). So the mere fact of a bonâ fide creditor being defeated is not of itself sufficient to set aside a deed founded on valuable consideration (*o*). Again, the mere fact of creditors being left out, or not provided for, or the mere fact of other creditors being provided for, is not sufficient to shew what has been called an express intent to defraud creditors (*p*). So a payment is bonâ fide within the statute, although the payer was then insolvent to his own knowledge, and even though the creditors who accepted the money knew that (*q*).

Mala fides of both parties supersedes any consideration.

A fraudulent intention, to which the purchaser was a party, will override all inquiry into the consideration (*r*).

Cadogan v. *Kennett*.

Thus, in *Cadogan* v. *Kennett* (*s*), Lord Mansfield, speaking of the statute 13 Eliz. c. 5, say: "The statute does not militate against any transaction bonâ fide and where there is no imagination of fraud; and so is the common law. But if the transaction be not bonâ fide, the circumstance of its being done for a *valuable consideration* will not *alone* take it out of the statute. I have known several cases where persons have given a fair and *full price* for goods, and where the *possession* was *actually changed;* yet, being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore void. One case was where there had been a decree in the Court of Chancery and a sequestration. A person, with knowledge of the decree, bought the house and goods belonging to the defendant, and gave a full price for them (*t*). The Court

(*m*) *In re Johnson*, 20 Ch. D., per Fry, J., 393.

(*n*) *Freeman* v. *Pope*, L. R. 5 Ch. at p. 544; *In re Johnson*, 20 Ch. D. at pp. 393, 394.

(*o*) *Holmes* v. *Penny*, 3 K. & J. 90; *In re Johnson*, 20 Ch. D. at p. 397.

(*p*) *Middleton* v. *Pollock*, 2 Ch. D. 102; *Ex parte Games*, 12 Ch. D. 314; *In re Johnson*, 51 L. J. (N.S.) Ch., per Jessel, M. R., 504.

(*q*) *Middleton* v. *Pollock*, 2 Ch. D. at p. 108.

(*r*) See *Bott* v. *Smith*, 21 Beav. 511, 517; *Acraman* v. *Corbett*, 1 J. & Hem. 410, 422–3; *Ex parte Chaplin*, 26 Ch. D. 319; post, p. 97.

(*s*) Cowp. 434.

(*t*) The fraud here seems to have consisted in converting property liable to sequestration into property not so liable, after the decree; see supra, pt. ii. ch. i.

said the purchase, being with a manifest view to defeat the creditor, was fraudulent, and therefore, notwithstanding a valuable consideration, void. So, if a man knows of a judgment and execution, and with a view to defeat it purchases the debtor's goods, it is void, because the *purpose* is **iniquitous*. It is assisting one man to cheat another, which the law will never allow." [* 86]

Twyne's Case (*u*), decided only ten years after the passing of the statute, has always been regarded as a leading authority on this point; there Pierce was indebted to Twyne in £400 and to Chamberlain in £200. Chamberlain brought an action of debt against Pierce, and he, pending the writ, secretly made a general gift of all his property whatsoever (which was worth about £300) to Twyne in satisfaction of his debt of £400. Pierce, however, still continued in possession of the goods; selling some of them, and exercising other acts of ownership over them, as if, in fact, no gift of them had been made. Chamberlain obtained judgment in his action, and took out a fi. fa., the execution of which was resisted by Twyne, claiming under the gift to him; and upon this case the Lord Keeper, the Chief Justice, and the whole Court of the Star Chamber held that the gift was fraudulent within the statute, and that although there was apparently a perfectly good and valuable consideration for the gift (it being made in satisfaction of a debt exceeding the value of the property given), yet there were such marks of fraud and mala fides as to avoid it notwithstanding. At the present time there are more ways than one by which such a gift could be avoided, but the case was decided on the statute 13 Eliz c. 5. alone. *Twyne's Case.*

The benefit of the section is moreover strictly confined to the purchaser and the interests created in his favour; so that even where there is a bonâ fide purchaser the consideration received for property sold by a debtor is now (*v*) liable to the same rules as the property would have been if unsold (*w*). In *French* v. *French* (*x*) a man made over his business, stock in- Proviso *only* extends to purchaser and persons claiming under him.

(*u*) 3 Rep. 80 b.

(*v*) Since the passing of 1 & 2 Vict. c. 110; see ante, p. 22.

(*w*) *Christ's Hospital* v. *Budgin*, 2 Vern. 683; *Goldsmith* v. *Russell*, 5 De G. M. & G. 547; *French* v. *French*, 6 De G. M. & G. 95; *Neale* v. *Day*, 28 L. J. (N.S) Ch. 45; *In re Johnson*, 20 Ch. D. 397, S. C. 51 L. J. (N.S.) Ch. 503.

(*x*) 6 De G. M. & G. 95.

Purchase-money may not be taken so as to defeat creditors.

trade, and fixtures, in consideration of a sum of money paid down and an annuity (one-sixth of the net profits of the business), to be paid to himself during the joint lives of himself and the purchaser, and afterwards a smaller annuity to his wife, during the joint lives of her and the purchaser, in case she survived him, with [* 87] power to *himself to dispose of his wife's annuity; and it appeared that the annuities were granted for the name and goodwill of the business and were to be collaterally secured by policies of assurance. On the vendor's death the wife's annuity was impeached by his creditors. Lord Chancellor Cranworth said that the annuity to the widow clearly formed a portion of the consideration which the vendor, instead of keeping himself for the benefit of his creditors, chose to keep for the benefit of his wife; such a transaction was fraudulent against creditors, and was an attempt to abstract from them what they were entitled to look to for payment of their debts. The sale was valid, but the consideration which was paid must be taken to have been voluntarily settled by the debtor on his wife. "I consider," said his Lordship, "that annuity so payable to the widow just in the same light as if it were taken and applied to his own purposes and abstracted from his creditors, and, in my opinion, it amounts to a voluntary settlement in favour of his wife." This was approved and followed under very similar circumstances by Lord Hatherley (then Vice-Chancellor Sir W. P. Wood) in *Neale* v. *Day* (*y*).

Consideration given so as to defraud creditors.

This principle is applicable to every case in which, though full consideration is given, it is given in such a way as to defeat the creditors (*z*); for in considering questions as to the good faith of a sale impeached by creditors it is material to investigate the amount of property withdrawn from the reach of creditors in proportion to their demands, and the value and tangibility of that substituted in its place (*a*), for it may be given in such a *form* as to defeat creditors (*b*), as in an old case, where a man invested money in mortgages and bonds taken in the joint names of himself and his wife,

(*y*) 28 L. J. (N.S.) Ch. 45.
(*z*) *Stileman* v. *Ashdown*, 2 Atk. 477, as explained in *Bott* v. *Smith*, 21 Beav. 511, 517.
(*a*) *Dewey* v. *Bayntun*, 6 East, 257.
(*b*) *Christ's Hospital* v. *Budgin*, 2 Vern. 683; *Stileman* v. *Ashdown*, 2 Atk. 477; *Bott* v. *Smith*, 21 Beav. 511, 517; and see *Cadogan* v. *Kennett*, Cowp. 434, et supra.

and she, after his death, was held a joint purchaser; but Lord Harcourt "admitted, in case of creditors, it might be fraudulent" (*c*).

Spencer v. *Slater*. Assignment to trustees to pay creditors.

In *Spencer* v. *Slater* (*d*) an insolvent debtor assigned *all* his *property to trustees upon trust to [*88] carry on his business, or to get in and realize his property, as his trustees deemed expedient, and to apportion the residue of the proceeds, after payment of expenses, according to an equal pound rate among his creditors. The deed provided that its execution or assent thereto by any creditor should operate as a full release to the debtor in respect of any debt of such creditor, and that a dividend should only be payable to a creditor who executed or assented to the deed; or that if, in a given time, a creditor did not execute or assent, his dividend should be paid by the trustees to the debtor. The deed also contained a covenant by the executing or assenting creditors to indemnify the trustees against any personal loss or risk they might sustain, except from their own wilful negligence or default, by reason of their proceedings under the deed. It was admitted that the deed was executed by a trader then insolvent for the purpose of defeating any execution, including one then apprehended and for the purposes stated in the deed. It was held that the deed was void under the statute, because its effect was to defeat and delay creditors, and also because it contained a resulting trust in favour of the debtor, in respect of sums due to creditors who refused to execute or assent to the deed. The trust to carry on the business, irrespective of the wishes of the creditors, also subjected them to delay and risk of losses, and clearly tended to defeat and delay them.

Boldero v. *London and Westminster Loan and Discount Company*.

But in *Boldero* v. *The London and Westminster Loan and Discount Company* (*e*), debtors, in trade and then insolvent, by deed assigned to trustees *all* their estate and effects on trust to sell the same and to divide the residue of the proceeds, after paying expenses, rateably among the creditors parties to the deed, and, if the trustees thought fit, also to creditors who refused or neglected to execute the deed, or to the debtors. The deed also empowered the trustees to carry on the trade

(*c*) *Christ's Hospital* v. *Budgin*, 2 Vern. 683; and see *Christy* v. *Courtenay*, 13 Beav. 96.

(*d*) 4 Q. B. D. 13.

(*e*) 5 Ex. D. 47; *Green* v. *Brand*, Times Rep. (1884), 79.

if thought expedient, and to pay maintenance to the debtors, and contained a covenant by the executing creditors to indemnify the debtors and the trustees in respect of certain bills of exchange and promissory notes; and the creditors further released the debtors from all debts, actions, &c., which they, the creditors, [* 89] might have up to the date of the deed. * It was held that this deed was not void under the statute. The statute did not touch the question of equal distribution of assets. The assignment, therefore, though it preferred certain creditors and tended to defeat the others, might be good.

This case was distinguished from *Spencer* v. *Slater* (*f*) because the primary object of this deed was a transfer for purposes of sale as a going concern, and not for the purpose of carrying on the business; the resulting trust in that case went far beyond the ordinary resulting trust in such a deed; and also the indemnity. In *Spencer* v. *Slater* (*f*) the ground of the decision seems really to be that the assignment was *not* for the benefit of the creditors, but for that of the debtor.

Fraudulent intention over-rides any valuable consideration;

even of marriage.

The intention to defeat the rights of creditors, when properly established, is sufficient to supersede any consideration. So even the consideration of marriage, though the highest known to our law, will not support a transaction without bonâ fides (*g*); and if the Court finds that the sacred nature of that consideration has been profaned, and that the ceremony of marriage has been resorted to as a mere pretence and cloak for a fraud, and finds clear evidence *that it is a fraudulent marriage*, it will be set aside on the ground of the insolvency or embarrassed circumstances of the husband, or as fraudulent against his creditors, on a subsequent bankruptcy (*h*).

Marriage settlements set aside.

Thus, in *Colombine* v. *Penhall* (*i*), a solicitor and money scrivener married a woman with whom he had cohabited for seven years previously, and by a deed of

(*f*) 4 Q. B. D. 13.

(*g*) *Cadogan* v. *Kennett*, Cowp. 432; *Campion* v. *Cotton*, 17 Ves. 263; *Hardey* v. *Green*, 12 Beav. 182; *Fraser* v. *Thompson*, 4 De G. & J. 659, 662; post, p. 332.

(*h*) Per Sir J. Stuart, in *Fraser* v. *Thompson*, 1 Giff. 65. That a marriage may be fraud on the bankruptcy laws, see *Higinbotham v. Holme*, 19 Ves. 88; and an act of bankruptcy, *Ex parte Mayor*, Mont. 292.

(*i*) 1 Sm. & Giff. 228.

settlement and articles of assignment, executed prior to the marriage, conveyed the whole of his property real and personal to trustees, upon certain trusts for his wife, with a joint power of appointment among the children of the marriage (including an illegitimate child), but reserving no interest to himself. Immediately after the marriage the power was exercised in favour of the illegitimate *child. The property remained under [* 90] the control of the husband, and within two months after the marriage a fiat in bankruptcy was issued against him. The wife filed a bill in Chancery to establish the settlement; but Sir John Stuart held that the settlement was itself an act of bankruptcy, and void against the assignees. He laid down the principle that "where there is evidence of an intent to defeat and delay creditors, and to make the celebration of a marriage a part of a scheme to protect property against the rights of creditors, the consideration of marriage cannot support such a settlement." *Colombine* v. *Penhall.* Marriage itself part of the fraud.

In *Bulmer* v. *Hunter* (*k*) the settlor had lived with his housekeeper as man and wife for a long period prior to their marriage in 1867. The plaintiff was a creditor of the settlor in 1847, and on the interest falling into arrears in 1862, after vain efforts to obtain payment, gave notice of trial on February 12, 1867. The solicitor of the settlor also acted for the housekeeper, and prepared a settlement of all the settlor's property which was executed on February 15, 1867. The marriage took place on February 18, 1867. It appeared from the evidence that there was no contemplation of a marriage till after the notice of trial was served upon the settlor, and that the housekeeper was implicated in the matter and knew all about the transaction before her marriage. Sir R. Malins, V. C., said: "It is clearly established now that *marriage cannot be made the means of committing fraud*, though it is necessary to shew that it was connected with fraud to make a settlement invalid against the wife. . . . . There was throughout these proceedings but one object, which was to commit a fraud, and on the principle of *Colombine* v. *Penhall* (*l*) and the other cases on which that decision is founded, the settlement cannot be supported. A marriage got up for the purpose of defrauding a man's creditors, where the intended wife is a party to the fraud, will not be supported." *Bulmer* v. *Hunter.*

(*k*) L. R. 8 Eq. 46, 49.
(*l*) 1 Sm. & Giff. 228.

Ante-nuptial settlements good *unless* the marriage itself fraudulent.

But the mere fact of the intending husband, or of the intending wife if the marriage is after December 31, 1882 (*m*), being deeply indebted will not make an ante-
[* 91] nuptial settlement void against *creditors, provided the marriage is entered into honestly and in good faith (*n*).

If marriage be honest question is can settlement be avoided without injury to innocent party?

When the marriage itself is honest, the question must be, not whether the settlement is a fraud on the creditors, but whether it can be set aside without defrauding the wife, or, if the marriage is after December 31, 1882, the party to it who is innocent of the fraud (*o*). A settlement made in consideration of marriage cannot be set aside by creditors of the husband, or of the wife if the marriage is after December 31, 1882 (*p*), unless it be clearly proved that *both* the intending husband and wife were parties to the fraud (*q*). It is not enough to avoid such a settlement that the intending husband *alone* committed the fraud (*q*) ; nor, if the marriage is after December 31, 1882, that the intending wife *alone* committed the fraud. So even where there are strong circumstances shewing fraud against the creditors, such as a false recital that the property was the wife's a settlement entered into in consideration of marriage will be supported (*r*).

Kevan v. *Crawford*.

In *Kevan* v. *Crawford* (*s*), a settlement in contemplation of marriage was made by a settlor, then utterly insolvent, which contained a false recital that the intended wife was a creditor of the settlor's for £20,000. The intended wife executed the settlement without being actually aware of the falsity of the statement, or that there was any such statement at all. She believed the settlor to have been then wealthy. Sir G. Jessel, M. R., said : "Whether that recital were in or out of the settlement, the covenant to settle the £20,000 in

(*m*) 45 & 46 Vict. c. 75, ss. 1 (1), 2, 19, 25.

(*n*) *Bulmer* v. *Hunter*, L. R. 8 Eq. 46, 49; *Kevan* v. *Crawford*, 6 Ch. D. 29; *Parnell* v. *Stedman*, 1 C. & E. 153.

(*o*) *Frazer* v. *Thompson*, 1 Giff. 49–62 ; for the innocent party is a purchaser, and if not a party or privy to the fraud, is within the proviso of the 6th section (ante, p. 78).

(*p*) 45 & 46 Vict. c. 75, ss. 1 (1), 2, 19, 25 ; and see Griffith, Married Women's Property Act, 5th ed. 129.

(*q*) Ante. p. 78. This is also the law in America : see Bump. Fr. Conv. 2nd ed. 290, 291, 294 ; and in Upper Canada ; *Mulholland* v. *Williamson*, 12 Chy. 91, S. C. 14 Chy. 291.

(*r*) *Campion* v. *Cotton*, 17 Ves. 263.

(*s*) 6 Ch. D. 29, 39 ; *Parnell* v. *Stedman*, 1 C. & E. 153.

consideration of the marriage would have been a covenant for value, and would have prevailed against creditors. Why should the mere fact of the insertion of an inaccurate recital, or untrue recital, vitiate the settlement, *as regards the wife, who was ignorant and innocent of the fraud?* I * cannot see why, and I [* 92] entirely concur with the Vice Chancellor, that the settlement was for value given by the wife—namely, the consideration of marriage; and that she was no party to the fraud, and that it is unimpeachable on the part of the creditors."

Ante-nuptial contract to settle after-acquired property upheld.

In *Hardey* v. *Green* (*t*) Lord Langdale, M. R., upheld a mutual covenant by husband and wife on their marriage to settle all after-acquired property (*u*) on such trusts as the wife should appoint, and, in default of appointment, on certain trusts for the husband, wife, and children, although at the time of the covenant the husband was insolvent, and neither he nor the wife had any property.

So where (*v*) a man fraudulently obtained administration to an intestate's estate, and settled on his marriage the property thus acquired, being in debt at the time, an injunction was granted restraining the trustees from dealing with the capital of the property, but not interfering with their application of the income to the trusts of the settlement (*w*).

(*t*) 12 Beav. 182, but see *Ex parte Bolland*, L. R. 17 Eq. 115, where the covenant was by the husband alone.

(*u*) See 46 & 47 Vict. c. 52, s. 47.

(*v*) *Gibson* v. *Head*, 17 W. R. 986.

(*w*) See also *Richardson* v. *Horton*, 7 Beav. 112; post, pp. 165, 166.

[* 93] * CHAPTER V.

BADGES OF FRAUD IN CONVEYANCES FOR VALUE.

Difficulty of upsetting a deed on valuable consideration.

THOSE who undertake to impeach for mala fides a deed which has been executed for valuable consideration have a task of great difficulty to discharge (*x*). The fact that there is valuable consideration shews at once that there may be purposes in the transaction other than the defeating or delaying of creditors, and renders the case, therefore, of those who contest the deed more difficult (*y*).

No certain rules can be laid down as to what is an honest transaction or the opposite; and though it was at one time attempted to lay down rules that particular things are indelible badges of fraud, this cannot be so, for every case must stand on its own footing; and the Court or the jury (*z*) must consider whether, having regard to all the circumstances, the transaction was a fair one, and intended to pass the property for a good and valuable consideration (*a*).

Actual fraud must be proved.

It is a question of actual and express fraud, and, as actual fraud is always a question of fact more than of law, it is impossible to lay down any definite and exact rules as to what is or what is not fraud (*b*). To do so would be to give to persons fraudulently inclined the power of evading the jurisdiction of the Courts by fresh contrivances which might be invented to elude any invariable, inflexible rule (*c*). Fraud, in its legal sense, has been defined as "an act unwarranted in law, [* 94] to the prejudice of a * third person, and not

No invariable rule as to what is fraud.

(*x*) Per Sir G. J. Turner, V.C., in *Harman* v. *Richards*, 10 Hare, 81, 89; and see *Wakefield* v. *Gibbon*, 1 Giff. 401.

(*y*) *In re Johnson*, 20 Ch. D. per Fry, J., 393.

(*z*) *In re Johnson*, 20 Ch. D. 389, S. C. 51 L. J. (N.S.) Ch. 503; and see post, p. 119.

(*a*) Per Sir R. T. Kindersley, V.C., in *Hale* v. *Metropolitan, &c., Co.*, 4 Drew. 492; *In re Johnson*, 20 Ch. D. per Fry, J., 394. But see per Sir G. Bramwell, B., in *Harris* v. *Rickett*, 4 H. & N. 5.

(*b*) *Holmes* v. *Panney*, 3 K. & J. 90; *In re Johnson*, 20 Ch. D., per Fry, J., 393, 394, and supra, p. 82.

(*c*) See Parkes' History of Court of Chancery, p. 508.

that crafty villainy or grossness of deceit to which it is applied in common language" (*d*): and there are certain circumstances which have always been looked upon as "badges" of fraud; that is, their presence will, unless satisfactorily explained, be evidence of bad faith, while, on the other hand, their absence will not necessarily rebut the existence of fraud.

But certain circumstances are badges of fraud.

The first mark of a fraudulent intention within the statute, mentioned in *Twyne's Case* (*e*), is the *generality* of the gift; it included all his posessions and left nothing whatever for the payment of his debts.

Badges of fraud in conveyances for value:
1. *Generality* of gift.

It has long been clearly settled that a conveyance by a trader, and since the Bankruptcy Act, 1861, by a non-trader also (*f*), of his *whole* property, or what is substantially the *whole* of his property, to trustees for his creditors *generally* was an act of bankruptcy (*f*), and, when so declared, void.

Act of bankruptcy.
Conveyance of *whole* property to trustees for creditors.

The reason of this was twofold. Such a conveyance was regarded as a declaration or admission of insolvency by the debtor, and it was an attempt by him to defeat the great principle of all bankruptcy law—namely, the equal distribution of the debtor's assets among his creditors.

Under the Bankruptcy Act, 1869 (*g*), a conveyance or assignment in England or elsewhere of the *whole* of a debtor's property (whether a trader or non-trader) to a trustee or trustees for the benefit of his creditors *generally* was an act of bankruptcy, and, when so declared, void.

By the Bankruptcy Act, 1883 (*h*), this has been re-enacted. The decisions, therefore, on the Act of 1869 will apply to cases under the Act of 1883.

An assignment by a debtor of his *whole* property, or

(*d*) *Harman* v. *Fisher*, Lofft, 472, 476.
(*e*) 3 Rep. 81 a; ante, p. 86.
(*f*) *Worsley* v. *Demattos*, 1 Burr. 467; *Lindon* v. *Sharp*, 6 Man. & Gr. 895; *Stewart* v. *Moody*, 1 C. M. & R. 777; *Dutton* v. *Morrison*, 17 Ves. 193; *Smith* v. *Cannon*, 2 E. B. 35; Robson, Bkcy. 5th ed. 154 et seq.; Yate Lee & Wace, Bkcy, 2nd ed. 23 et seq.
(*g*) 32 & 33 Vict. c. 71, s. 6 (1).
(*h*) 46 & 47 Vict. c. 52, s. 4 (1) A.

Assignment of *whole* property to secure past debt.

of the *whole* with a merely colourable exception, to a creditor as a security or in satisfaction or payment of [* 95] a past debt only, even if * by a mortgage, has long been held to be fraudulent under the bankruptcy law and an act of bankruptcy, and, when so declared, void, whatever the motives of the parties may have been, because it prevented the other creditors from issuing execution (*i*). This rule now applies to non-traders as well as traders.

The ground of this is that the necessary effect of such an assignment must be to prevent the debtor (if a trader) carrying on his trade, and, whether a trader or non-trader, to defeat and delay his creditors. The debtor in this class of cases receives no present equivalent for such conveyance (*k*).

So an assignment by a trader of all his property by way of indemnity for which he receives no equivalent from which benefit may accrue to his general creditors has long been held an act of bankruptcy (*l*).

Assignment of all property for past debt and further advance.

If such assignment is partly as security for a past debt, and partly as security for a substantial present (*m*) or future (*n*) advance or some other fair equivalent, it is not necessarily an act of bankruptcy; and the intent of the parties must be proved in order to avoid the deed.

The question in determing this point is, not whether the advance is great or small, but whether there is a bonâ fide intention of carrying on the business. To shew this, the amount of the advance, or the value of the equivalent, is strong evidence to prove whether the parties really meant to enable the debtor to carry on his

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(*i*) *Smith* v. *Cannon*, 2 E. & B. 35; *Ex parte Foxley*, L. R. 3 Ch. 515; *In re Wood*, L. R. 7 Ch. 302; *Ex parte Ellis*, 2 Ch. D. per Mellish, L.J., 798; *Ex parte Field*, 13 Ch. D. 106 n.; and see cases cited in *Twyne's Case*, 1 Sm. L. C. 8th ed. pp. 12 et seq.

(*k*) *Tomkins* v. *Saffrey*, 3 App. Cas. 213; *Ex parte Chaplin*, 26 Ch. D. 319; see Robson, Bkcy. 5th ed. 156 et seq.

(*l*) *Worsley* v. *Demattos*, 1 Burr. 467; *Leake* v. *Young*, 5 E. & B. 955.

(*m*) *Ex parte King*, 2 Ch. D. 256; *Ex parte Ellis*, 2 Ch. D., per Mellish, L.J., 798; *Ex parte Greener*, 46 L. J. (N.S.) Bkcy. 76; *Ex parte Hauxwell*, 23 Ch. D. 626.

(*n*) *Ex parte Dann*, 17 Ch. D. 27; *Ex parte Wilkinson*, 22 Ch. D. 788; *Ex parte Fisher*, L. R. 7 Ch., per Mellish, L.J., 642, and cases there cited; and see Robson, Bkcy. 5th ed. 161 et seq.

business, or to meet his engagements, or merely meant to secure past advances (*o*).

But a sale by a trader of all his property at a fair price to a * bonâ fide purchaser is not an act of [* 96] bankruptcy, for the debtor merely changes the character of his property (*q*).

So an assignment by a trader of all his effects simply to secure an *advance* is not of itself an act of bankruptcy (*r*); nor if to pay off an existing charge or debt if made to carry out an absolute (*s*) agreement bonâ fide entered into at the time of the loan.

Assignment of *all* property for advance alone.

Whether the assignment of the *whole* of the debtor's property is merely to secure a past debt only, or partly to secure such debt and also a present advance, or wholly to secure a present advance, the assignment is not an act of bankruptcy in the following two cases (*t*):—

1. If there is a substantial (*u*) exception out of the assignment of the debtor's property, such an exception as might possibly enable him to carry on his trade with advantage.

2. If the debtor really has the advantage of the present advance, which in this case is regarded as if it were a substantial exception out of his whole property, and is really a present equivalent to the debtor (*v*).

The act of bankruptcy is complete upon the execution

(*o*) *Ex parte Foxley*, L. R. 3 Ch. 515; *Ex parte Fisher*, L. R. 7 Ch. 636; *Ex parte Burton*, 13 Ch. D. 102; *Ex parte Chaplin*, 26 Ch. D. 319.

(*q*) *Baxter* v. *Pritchard*, 1 A. & E. 406; *Ex parte Stubbins*, 17 Ch. D. 58; and see Robson, Bkcy. 5th ed. 157 et seq.

(*r*) *Re Colemere*, L. R. 1 Ch. 128; *Mercer* v. *Peterson*, L. R. 2 Ex. 304, S. C. 3 Ex. 104; and see *Lomax* v. *Buxton*, L. R. 6 C. P. 107; *Harrison* v. *Cohen*, 32 L. T. (N.S.) 719.

(*s*) *Ex parte Fisher*, L. R. 7 Ch. 636; *Ex parte Izard*, L. R. 9 Ch. 271; *Ex parte King*, 2 Ch. D. 256; *Ex parte Hauxwell*, 23 Ch. D. 626. See Yate Lee & Wace, Bkcy. 2nd ed. 33 et seq.

(*t*) *Lomax* v. *Buxton*, L. R. 6 C. P. per Willes, J., 112.

(*u*) See *Hale* v. *Allnut*, 18 C. B. 515; *Ex parte Foxley*, L. R. 3 Ch. 515; *Ex parte King*, 2 Ch. D. 256; *Ex parte Burton*, 13 Ch. D. 102; *Ex parte Field*, 13 Ch. D. 106 n.; *Ex parte Dann*, 17 Ch. D. 26. See Yate Lee & Wace, Bkcy. 2nd ed. 26 et seq.

(*v*) *In re Colemere*, L. R. 1 Ch., per Cranworth, L.C., 132; *Mercer* v. *Peterson*, L. R. 3 Ex., per Cockburn, C.J., 106; *Lomax* v. *Buxton*, L. R. 6 C. P., per Willes, J., 112; and see Yate Lee & Wace, Bkcy. 2nd ed. 27 et seq.

of the deed by the debtor (*w*). But, of course, the act relied upon as an act of bankruptcy must have occurred within the period allowed by the Act for taking proceedings in bankruptcy (*x*).

Assignment of *whole* property not on that account necessarily fraudulent under 13 Eliz. c. 5.

But the statute 13 Eliz. c. 5 had no such object (*y*). The meaning of the statute is that the debtor must not [* 97] retain a benefit * for himself (*z*). Whether the deed deals with the whole or only a part of the grantor's property is under this statute immaterial. The essential thing is that the deed must be bonâ fide.

Ex parte Games.

In *Ex parte Games* (*a*) the grantor executed a bill of sale by way of mortgage of *all* his then existing and after-acquired property to secure an existing debt and future advances. The deed was barred by time from being available as an act of bankruptcy. It was there said by Thesiger, L. J.: "The only remaining point is whether the deed, not being available as an act of bankruptcy for any purpose, is void under the statute of Elizabeth. We may, I think, put aside for this purpose the fact that it is an assignment of the whole of the grantor's property, present and future. For, in *Alton* v. *Harrison* (*b*), Lord Justice Giffard said: 'I have no hesitation in saying that it makes no difference in regard to the statute of Elizabeth whether the deed deals with the whole or only a part of the grantor's property. If the deed is bonâ fide—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the statute of Elizabeth.' Applying these remarks to the present case, and taking the question to be, what it plainly must be, was the deed bonâ fide or was it a mere cloak for retaining a benefit to the grantor, what are the facts? Undoubtedly there was good consideration given for the deed; though it was not good under the bankruptcy law, it was perfectly good under the statute of Elizabeth. The consideration was a pre-existing debt and further advances, which together appear to amount to nearly the value of the property. I can see nothing in the deed itself, or

(*w*) *Ponsford* v. *Walton*, L. R. 3 C. P. 167.
(*x*) 32 & 33 Vict. c. 71, s. 6; 46 & 47 Vict. c. 52, s. 6 (1) C.
(*y*) *Alton* v. *Harrison*, L. R. 4 Ch., per Giffard, L.J., 622, 625; post, p. 97.
(*z*) *Middleton* v. *Pollock*, 2 Ch. D., per Jessel, M. R., at pp. 108, 109; ante, pp. 11, 12.
(*a*) 12 Ch. D. 314; *Smith* v. *Tatton*, 6 L. R. Ir. 32; and see *Allen* v. *Bonnett*, L. R. 5 Ch. 577.
(*b*) L. R. 4 Ch. 622.

in the facts or the nature of the transaction, to shew that it was not a perfectly valid transaction, without any intention to defeat or delay the grantor's creditors."

But still, viewed in connection with the other circumstances, this fact may be a badge of fraud.

In *Ex parte Chaplin* (*c*) a trader executed an assignment of * substantially the *whole* of his prop- [* 98] erty in consideration of the release of a debt of about £1370 (in the deed stated to be £3271) and a verbal agreement by the assignee to pay his creditors, but whether the whole of them or merely his trade creditors was not clear. The assignee paid out some executions and some overdue rent, and made advances to carry on the business, which was carried on in the assignor's name, by the direction of the assignee, under an agreement in writing between them. The assignment was held void, both under the Bankruptcy Act and under the statute of Elizabeth, as necessarily delaying creditors in their ordinary remedies. So a conveyance by an insolvent debtor of *all* his property to trustees upon trust for his creditors equally on certain conditions, with a resulting trust for the debtor as regarded such creditors as did not come in under the deed, has been held within the statute, because there was a resulting trust for the debtor, and also as tending to delay or defeat creditors (*d*); but where the resulting trust in such a conveyance was a merely common clause, and the primary trust was to realize the business, the deed was upheld (*e*).

Under this statute of Elizabeth, therefore, although the *generality* of the gift is, when taken in conjunction with other circumstances, a mark of fraud (*f*), for dolus versatur in generalibus (*g*), yet it is no concluding proof, either under this statute or by the common law (*h*).

(*c*) 26 Ch. D. 319; see judgment of Fry, L.J., 336–338.

(*d*) *Spencer* v. *Slater*, 4 Q. B. D. 13.

(*e*) *Boldero* v. *London and Westminster Loan and Discount Co.*, 5 Ex. D. 47; *Green* v. *Brand*, Times Rep. (1884), 79.

(*f*) *Chamberlain* v. *Twyne* (*Twyne's Case*), F. Moo. 638; *Stileman* v. *Ashdown*, 2 Atk. 477, 481; *Mathews* v. *Feaver*, 1 Cox, 280; Dig. lib. 42, tit. 8, par. 17, sec. 1.

(*g*) *Twyne's Case*, 3 Co. 81 a; *Stone* v. *Grubham*, 2 Buls. 225.

(*h*) *Chamberlain* v. *Twyne*, F. Moo. 638; *Nunn* v. *Wilsmore*, 8 T. R. 528; *Ingliss* v. *Grant*, 5 T. R. 530; *Meux* v. *Howell*, 4 East, 1; *Janes* v. *Whitbread*; 11 C. B. 406; *Alton* v. *Harrison*, L. R. 4

2. *Continuance in possession.*

The second badge of fraud mentioned in *Twyne's Case* (*i*) is the donor's *continuance in possession* of the goods, which is a subject of sufficient importance to demand a separate chapter (*k*).

3. *Secrecy.*

[* 99] *The third badge of fraud noticed in *Twyne's Case* (*l*) is *secrecy*. This is always evidence, but not of itself conclusive evidence, of fraud (*m*); as in *Ryall* v. *Rolle* (*n*), where a man made a mortgage of his leaseholds, which he mentioned openly, and also a mortgage of his goods and chattels, which he kept secret. The subject is intimately connected with the doctrine of continuance in possession, and will be there treated of (*o*).

4. *Pendente lite.*

The fourth badge of fraud noticed in *Twyne's Case* (*p*) is that the gift was made *pendente lite*. This is, when coupled with other circumstances, suggestive of fraud, but where the consideration is adequate, not a strong mark of a fraudulent intention.

Voluntary conveyance to defeat execution void.

If for value, a mark of fraud,

A mere voluntary conveyance for the purpose of defeating an expected execution or other process for recovery of debts is invalid (*q*); and even as to conveyances on valuable consideration, the fact that they were made for such a purpose pendente lite has been regarded as a circumstance of fraud (*r*). So a conveyance by an

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Ch. 622; *Evans* v. *Jones*, 11 Jur. (N.S.) 784; *Middleton* v. *Pollock*, 2 Ch. D. 164; *Ex parte Games*, 12 Ch. D. 314; *Boldero* v. *London and Westminster Loan and Discount Co.*, 5 Ex. D. 47. But (as with other marks of fraud) the generality of the gift is stronger evidence of fraud where the conveyance is voluntary; see ante, p. 66.

(*i*) 3 Rep. 81 a; ante, p. 86.

(*k*) Post, pp. 113 et seq.

(*l*) 3 Rep. 81 a; ante, p. 86.

(*m*) 3 Co. 72 a; 3 Com. Dig. 296; *Griffin* v. *Stanhope*, Cro. Jac. 454; *Partridge* v. *Gopp*, 2 Amb. 596; *Worsley* v. *Demattos*, 1 Burr. 467; *Latimer* v. *Batson*, 4 B. & C. 652; *Leonard* v. *Baker*, 1 Mau. & S. 251; *Corlett* v. *Radcliffe*, 14 Moo. P. C. 139; post, p. 126.

(*n*) 1 Atk. 165, S. C. 1 Ves. 348; post, p. 116.

(*o*) *Middleton* v. *Pollock*, 2 Ch. D. 104; *In re Johnson*, 20 Ch. D. 389, S. C. 51 L. J. (N.S.) Ch. 503; *Ex parte Chaplin*, 26 Ch. D. 319; post, pp. 126, 127.

(*p*) 3 Rep. 81 a; ante, p. 86.

(*q*) Ante, p. 70.

(*r*) *Twyne's Case*, 3 Rep. 80 b, 81 a; *Bott* v. *Smith*, 21 Beav. 511; *Jones* v. *Boulter*, 1 Cox, 288, 295; *Cadogan* v. *Kennett*, Cowp. 434, Com. Dig. vol. iii. p. 296, pl. 13; *Ex parte Games*, 12 Ch. D. 314; *Spencer* v. *Slater*, 4 Q. B. D. 13; *Boldero* v. *London and Westminster Loan and Discount Co.*, 5 Ex. D. 47; *Green* v. *Brand*, Times Rep. (1884), 79.

old man of his whole property to a son, in consideration of a sum of cash and an annuity, *after* he had been served with a debtor's summons was held fraudulent and void (*s*). It has long been settled beyond dispute, that a sale of property for good consideration is not, either by the common law or by the statute of Elizabeth, fraudulent against creditors, *merely* because it was made with the intention of defeating a particular execution (*t*); up to *the day of delivery of [* 100] the writ of execution the debtor may sell his property, provided it is not a mere trick (*u*), or the consideration a sham (*v*).

but not void merely for that reason.

This was expressly decided in the case of *Wood* v. *Dixie* (*w*); there the point was whether, where a debtor executes a bill of sale by way of mortgage of his goods as a security for money lent, the bill of sale is void if the object be to defeat an expected execution. Coltman, J., told the jury that, if the intention of the transaction was to defeat the execution creditor, the conveyance was void as against him; and the Court of Queen's Bench held that direction wrong. The principle, however, is much older than that case, and much more extensive. There the consideration was money lent at the time, but it applies equally where the consideration is an antecedent debt, for "there is no rule of law which prevents a man from preferring one bonâ fide creditor to another" (*x*); and a debt due is a good and valuable consideration (*y*). And it seems clear that the doctrine on this point is the same in equity as at law, and a deed executed honestly for the purpose of giving a security to the creditor, and not being a contrivance

One bonâ fide creditor may be preferred to another, both at law and in equity.

(*s*) *In re Maddever*, 27 Ch. D. 523.

(*t*) *Holbird* v. *Anderson*, 5 T. R. 235; *Wood* v. *Dixie*, 7 Q. B. 892; *Janes* v. *Whitbread*, 11 C. B. 406; *Pickstock* v. *Lyster*, 3 Man. & S. 371; *Benton* v. *Thornhill*, 2 Mars. 427, 430; *Riches* v. *Evans*, 9 Car. & P. 642; *Marlow* v. *Orgill*, 8 Jur. (N.S.) 829; *Follett* v. *Wesley*, 10 Jur. 327; *Alton* v. *Harrison*, L. R. 4 Ch. 622; *Johnson* v. *Osenton*, L. R. 4 Ex. 107. The American law is the same: see *Banfield* v. *Whipple*, 15 Allen (Mass.), 13; Bump. Fr. Conv. (Amer.), 2nd ed. 37, 38.

(*u*) *Bunyard* v. *Seabrook*, 1 F. & F. 321.

(*v*) *Michael* v. *Gay*, 1 F. & F. 409.

(*w*) 7 Q. B. 892.

(*x*) Per Gibbs, C.J., in *Benton* v. *Thornhill*, 2 Mars. 430, S. C. 7 Taunt. 149; *Eslwick* v. *Caillaud*, 5 T. R. 420, 424; *Riches* v. *Evans*, 9 C. & P. 640; and see *Owen* v. *Body*, 5 A. & E. 28; *Gooch* v. *Deakin*, 1 New R. 95; *Middleton* v. *Pollock*, 2 Ch. D. 108. *Ex parte Games*, 12 Ch, D. 314.

(*y*) *Twyne's Case*, 3 Rep. 80 b; *Middleton* v. *Pollock*, 2 Ch. D. 108; but see post, p. 252.

resorted to for the benefit of the debtor himself, will be valid (*z*); and this, even if the transaction is one which, if the debtor had lived, would have been a fraudulent preference (*a*). So a writ of sequestration cannot be defeated by a mortgage for value made to a person with notice (*b*).

Fraudulent preference under bankruptcy laws.

But under the policy of the bankruptcy laws since the time of Lord Mansfield, a fraudulent preference, if [* 101] made on the eve of, and *followed by, the bankruptcy of the debtor, is void against his creditors, because it aims at preventing that equal distribution of assets among the creditors which has always been the object of those laws (*c*). The doctrine of fraudulent preference is entirely for the purpose of distribution among the creditors generally, not for the benefit of any single creditor (*d*).

When a fraudulent preference arises.

A fraudulent preference arises where the debtor, in contemplation of bankruptcy—that is, knowing his circumstances to be such as that bankruptcy must be, or will be, the probable result, though it may not be the inevitable result—does, *ex mero motu*, make a payment of money or a delivery of property to a creditor, not in the ordinary course of business, and without any pressure or demand on the part of the creditor (*e*).

This formerly required the concurrence of the two following conditions:—

The act must have been the free spontaneous act of the debtor without any pressure on the part of the creditor.

It must have been made by the debtor in contemplation of his bankruptcy.

(*z*) Per Sir G. M. Giffard, L.J., in *Alton* v. *Harrison*, L. R. 4 Ch. 622, 626; *Ex parte Games*, 12 Ch. D. 314; and see *Hale* v. *Saloon Omnibus Co.*, 4 Drew. 492, in which Sir R. T. Kindersley expressed his approval of the decision in *Wood* v. *Dixie*, 7 Q. B. 892. The case of *Blenkinsopp* v. *Blenkinsopp*, 12 Beav. 568, 1 De G. M. & G. 495, cited contrà in Peachey on Settlements, p. 206, was an attempt to defeat sequestration by a *voluntary* deed: see ante, p. 72.

(*a*) *Middleton* v. *Pollock*, 2 Ch. D. 104.

(*b*) *Ward* v. *Booth*, L. R. 14 Eq. 195.

(*c*) *Alderson* v. *Temple*, 4 Burr. 2235; *Crosby* v. *Crouch*, 2 Camp. 168; *Morgan* v. *Brundrett*, 5 B & Ad. 289.

(*d*) *Ex parte Cooper*, L. R. 10 Ch. per Mellish, L.J., 511.

(*e*) *Nunes* v. *Carter*, L. R. 1 P. C., per Lord Westbury, 348.

This last condition has been held to mean that the debtor must have been in such a hopeless state of insolvency that he could not reasonably hope to avoid bankruptcy, and that there need not be any intention on his part to become a bankrupt (*f*).

The Bankruptcy Act, 1869 (*g*), contained the first statutory enactment on the subject, which is as follows:— Bankruptcy Act, 1869.

"Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered, by any person unable to pay his debts as they become due from his own moneys, in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying or suffering the same become *bankrupt within three months [* 102] after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt appointed under this Act; but this section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration" (*h*).

The Bankruptcy Act, 1883 (*i*), practically re-enacts this section of the Act of 1869, except only in the protecting clause, which is as follows:—"This section shall not affect the rights of any person making title in good faith and for valuable consideration, through or under a creditor of the bankrupt." Bankruptcy Act, 1883.

Under the Act of 1883 a fraudulant preference is declared an act of bankruptcy (*k*), which it was not under the Act of 1869 (*l*).

The cases decided under the Bankruptcy Act, 1869 (*g*), are therefore authorities on the corresponding section of the Act of 1883, except with regard to the proviso in that section.

(*f*) *Gibson* v. *Boutts*, 4 M. & G. 169; see Robson Bkcy. 5th ed. 167, 172, 173.

(*g*) Section 92.

(*h*) The proviso extends to a case of the consideration being the payment of a pre-existing debt: *Ex parte Norton*, L. R. 6 Eq. 397; *Tompkins* v. *Saffery*, 3 App. Cas. 213.

(*i*) Section 48. (*k*) Section 4 (1) C.

(*l*) *Ex parte Stubbins*, 17 Ch. D. 58.

The Act of 1869 considerably altered the old law of fraudulent preference, leaving only the old law as to what was pressure as it stood (*n*); and the decisions before the Act of 1869 must be regarded only as guides, and not as substituting a standard for that laid down in that Act (*o*).

What is a fraudulent preference under Act 1883.

The conditions which must now co-exist for an act to be a fraudulent preference (subject, of course, to the proviso in favour of persons claiming through or under a creditor of the debtor) under the Act of 1883 are the three following:—

1. The act must be done by a person unable to pay his debts as they become due from his own moneys (*p*).

2. The act must be done with the view of giving the particular creditor a preference over the other creditors (*q*).

[* 103] * 3. Within three months of the date of the act a petition in bankruptcy must have been presented which ultimately results in the debtor's bankruptcy (*r*).

What is giving a creditor a preference.

The words "with a view of giving such creditor a preference over the other creditors" practically seem to mean the same thing as the word "voluntary" in the technical sense which it had under the old law (*s*).

The act under the old law was done "voluntarily" *only* if it was not done under the influence of pressure from the creditor (*t*). There is no really definite test to decide what is or what is not sufficient pressure to prevent the act being a fraudulent preference. The principle, said James, L.J. (*u*), is that, in order to constitute a fraudulent preference, the act must be the spontaneous act of the debtor not bonâ fide originating in a demand or some other step of the creditor.

(*n*) *Butcher* v. *Stead*, L. R. 7 H. L., per Cairns, L. C., 846; but see *Ex parte Tempest*, L. R. 6 Ch. 70; *Ex parte Topham*, L. R. 8 Ch. 614.

(*o*) *Ex parte Griffith*, 23 Ch. D. 69; *Ex parte Hill*, 23 Ch. D. 695.

(*p*) See ante, p. 101.

(*q*) See post, p. 103.

(*r*) *Re Liverpool and London Guarantee Co.*, 30 W. R. 378.

(*s*) *Ex parte Bolland*, L. R. 7 Ch. per Mellish, L.J., 27.

(*t*) Robson, Bkcy. 5th ed. 168 et seq., 175; Yate Lee & Wace, Bkcy. 2d ed. 423 et seq. *Smith* v. *Pilgrim*, 2 Ch. D. 127.

(*u*) *Ex parte Tempest*, L. R. 6 Ch. at 74; and see Yate Lee & Wace, Bkcy, 2nd ed. 425 et seq.

And even if the pressure be sufficient, it must also be bonâ fide on the part of the creditor. There must be no conclusion between the creditor who is being preferred and the debtor (*v*).

The desire to prefer or favour a particular creditor must be the *substantial* dominant motive or view operating on the mind of the debtor, but it need not be the *sole* motive or view (*w*).

To what cases doctrine applies,

The doctrine of fraudulent preference is not confined to cases of payments made or securities given for *past* debts; it appplies to any transaction amounting to a disposition of property which places one creditor in a better position to recover his debt than other creditors (*x*).

but only as between debtor and creditor.

But the relationship between the parties to the transaction * must, in the strict sense of the [* 104] words, be that of debtor and creditor (*y*).

But not under 13 Eliz. c. 5.

But the statute 13 Eliz. c. 5, had no such object (*z*). It has no regard whatever to the question of preference or priority among the creditors of the debtor (*a*). Under that statute a man may pay one bonâ fide creditor in preference to, and for the express purpose of defeating executions or other processes by, his other creditors (*b*); and even if such a voluntary payment comprised the whole property of the debtor it would not necessarily be held fraudulent (*a*).

Secus as to preference really fraudulent.

But, of course, where a man's creditors have all agreed to accept a composition, a secret preference in favour of one of them to induce him to sign the deed to which all the creditors are parties is a fraud on the

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(*v*) *Ex parte Reader*, L. R. 20 Eq. 763; *Ex parte Hall*, 19 Ch. D. 580.

(*w*) *Ex parte Griffith*, 23 Ch. D. 69; *Ex parte Hill*, 23 Ch. D. 695; *Ex parte Lancaster*, 25 Ch. D. 311; but see *Ex parte Blackburn*, L. R. 12 Ex. 358; *Ex parte Topham*, L. R. 8 Ch. 614.

(*x*) *Ex parte Pearson*, L. R. 8 Ch. 667; Robson, Bkcy. 5th ed. 171, 177.

(*y*) *Edwards* v. *Glyn*, 2 E. E. 29; *Ex parte Kelley*, 11 Ch. D. 306; *Ex parte Stubbins*, 17 Ch. D. 58.

(*z*) See ante, p. 96.

(*a*) *Middleton* v. *Pollock*, 2 Ch. D. 104; *Ex parte Games*, 12 Ch. D. 314.

(*b*) *Alton* v. *Harrison*, L. R. 4 Ch. 622; *Ex parte Games*, 12 Ch. D. 314.

other creditors, both at law (*c*) and in equity (*d*); in such a case there is actual fraud, and not merely a technical fraud, in breaking in upon the rateable distribution of a bankrupt's property.

In any arrangement with creditors all must share alike.

So where there is a bankruptcy or an arrangement with creditors by composition or insolvency, when insolvency exists as contradistinguished from bankruptcy, it is the duty of all creditors who have once taken part in the proceedings of bankruptcy or composition to stand to share and share alike. Any arrangement, therefore, entered into by one creditor, unknown to the general body, by which he gets for himself from the debtor, or from any one on behalf of the debtor, any collateral advantage whatever, is a fraud upon the general body of creditors. This is a general principle of the common law which applies to all such deeds (*e*).

General assignment for creditors to defeat particular execution valid.

[*105] *One of the most remarkable cases of a debtor being allowed to defeat the execution of some creditors in favour of all, is where a debtor voluntarily assigns over his property for the benefit of his creditors, and such assignment is valid, though made for the express purpose of defeating a particular creditor (*f*), and that quite independently of any statute enabling a debtor to enter into arrangements with his creditors (*g*).

Pickstock v. *Lyster.*

Pickstock v. *Lyster* (*h*) may be taken as an illustration of this doctrine. There an insolvent debtor, being sued by a creditor, pending the suit and before execu-

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(*c*) *Leicester* v. *Rose*, 4 East, 372; *Cockshot* v. *Bennett*, 2 T. R. 863; *Jackson* v. *Lomas*, 4 T. R. 166; *Smith* v. *Cuff*, 6 Mau. & S. 160; *Alsager* v. *Spalding*, 4 Bing. N. C. 407; *Wilson* v. *Ray*, 10 A. & E. 82; *Bradshaw* v. *Bradshaw*, 9 M. & W. 29; *Horton* v. *Riley*, 11 M. & W. 492; *Higgins* v. *Pitt*, 4 Ex. 312; *Smith* v. *Salzmann*, 9 Ex. 535.

(*d*) *Chesterfield* v. *Janssen*, 2 Ves. 156; *Middleton* v. *Lord Onslow*, 1 P. Wms. 768; *Fawcett* v. *Gee*, 3 Anstr. 910; *Spurret* v. *Spiller*, 1 Atk. 105; *Constantine* v. *Blache*, 1 Cox, 287; *Cullingworth* v. *Loyd*, 2 Beav. 385; *In re Cross*, 4 De G. & Sm. 364.

(*e*) *Jackman* v. *Marshall*, 13 Ves. 581; *Mare* v. *Sanford*, 1 Giff, 288; *Hall* v. *Dyson*, 17 Q. B. 785; *Douglish* v. *Tennent*, L. R. 2 Q. B. 49; *M'Kewan* v. *Sanderson*, L. R. 20 Eq. 65; *Ex parte Milner*, 15 Q. B. D. 605.

(*f*) *Darvill* v. *Terry*, 6 H. & N. 811.

(*g*) See Bankruptcy Acts, 1861 (24 & 25 Vict. c. 134), ss. 192 et seq.; 1869 (32 & 33 Vict. c. 71), ss. 125, 126; and 1883 (46 & 47 Vict. c. 52), ss. 18, 19.

(*h*) 3 Mau. & S. 371. See also the older case of *Stephenson* v. *Hayward*, Prec. Ch. 310.

tion, executed an assignment of *all* his effects to trustees for the benefit of all his creditors, under which possession was immediately taken. It was held by Lord Ellenborough and the Court of King's Bench that the assignment, though made with the intention of defeating execution under the pending suit, was not fraudulent against the suing creditor. If the conveyance in this case was not good it would break in upon the validity of all judgments confessed by executors or by the party himself, where that has been done to give a preference to some particular creditor. No doubt, the first motive in many of those cases, as well as in this, was to defeat the particular creditor; but it is no injury to him, it being for the benefit of all the creditors to procure an equal distribution amongst all of the fund to which all have an equal right against one who has gained the first step upon them; when no purpose of fraud is proved, such a transaction is to be referred to an act of duty rather than of fraud; it arises out of a moral duty attached to the character of debtor to make the fund available for the whole body of creditors (*i*); this was not a deed by which the party stipulated for a *benefit to himself*, but all his property was fairly to be distributed amongst his creditors, including this particular creditor; and to hold such a deed fraudulent would be contrary not only to *Holbird* v. *Anderson* (*k*), * but to all cases which have decided that a [* 106] party, independently of the Bankrupt Statutes, may convey away his property for the benefit of all his creditors.

Holbird v. *Anderson.*

The case of *Holbird* v. *Anderson*(*k*) was even stronger. There Charter, being indebted to Shepherd and Holbird, and being sued to judgment by Shepherd, went to Holbird and voluntarily gave him a warrant of attorney on which judgment was immediately entered, and execution levied on the same day on which Shepherd would have been entitled to execution and had threatened to sue it out. Lord Kenyon said there was no fraud in the case. Holbird was preferred by his debtor, not with a view of any benefit to the latter, but merely to secure the payment of a just debt to the former, in which there was no illegality or injustice. This war-

Judgment confessed by a judgment debtor.

(*i*) But see now the Bankruptcy Act, 1869, s. 6 (1), by which "conveyances or assignments" for the benefit of the debtor's creditors generally are acts of bankruptcy; re-enacted by the Bankruptcy Act, 1883, s. 4 (1) A.

(*k*) 5 T. R. 235.

rant of attorney was given on good consideration and bonâ fide, and the rule concerning creditors of unequal degrees does not apply inter vivos. So now a debtor in insolvent circumstances may, unless the transaction amount to a fraudulent preference within the meaning of the bankruptcy law, prefer one of his creditors to another (*m*).

General conveyance to a trustee not a creditor.

The principle of *Pickstock* v. *Lyster* (*n*) applies equally, although the trustee for creditors is not himself a creditor, and a provision is made for paying his expenses before the debts, and for paying the costs of compromising an action commenced against the debtor, and although, it seems, such a trust is not necessarily for the general benefit of the creditors (*o*).

Judgment confessed for larger sum than necessary.

In such a case, of course, the assignment or bill of sale, being general, including all the property of the debtor, is a necessary element, and therefore no badge of fraud. Where, however, as in *Holbird* v. *Anderson* (*p*), the assignment, or confession of judgment, is to one creditor, and not to all of them, the fact that it covers more property than is necessary for satisfying that debt is a suspicious circumstance (*q*), and there [* 107] must be no doubt that * there was a bonâ fide debt owing (*r*) or consideration paid (*s*); but it seems that a debtor may confess judgment to a creditor for a large nominal sum, with a defeasance that execution shall only issue for such an amount as to cover the debt of that creditor and all the other creditors for the purpose of making a rateable distribution among them (*t*).

Defeasance restricting execution.

Deed to defeat execution must be for value.

But, even independently of the bankrupt laws, a deed made to defeat a particular execution, or in pref-

(*m*) *Gladstone* v. *Padwick*, L. R. 6 Ex. 203, 209, 211; *Middleton* v. *Pollock*, 2 Ch. D. 108; *Ex parte Games*, 12 Ch. D., per James, L.J., 321.

(*n*) 3 Man. & S. 371, et supra.

(*o*) *Bowen* v. *Bramidge*, 6 Car. & P. 140; *Boldero* v. *London and Westminster Loan and Discount Co.*, 5 Ex. D. 47; *Green* v. *Brand*, Times Rep. (1884), 79.

(*p*) 5 T. R. 235.

(*q*) *Tolputt* v. *Wells*, 1 M. & S. pt. 2, 395; *Benton* v. *Thornhill*, 7 Taunt. 149, 2 Mars. 427; *Hodgson* v. *Newman*, 5 T. R. 236, 239, mentioned in *Holbird* v. *Anderson*.

(*r*) *Goss* v. *Neale*, 5 J. B. Moo. 19.

(*s*) *Darrill* v. *Terry*, 6 H. & N. 807–11.

(*t*) *Meux* v. *Howell*, 4 East, 1. See also *Siggers* v. *Evans*, 5 E. & B. 367, explained in *Johns* v. *James*, 8 Ch. D. at p. 751.

erence of one creditor over others, must be on good and valuable consideration (*u*).

Conveyances for creditors not communicated to them.

A conveyance by a debtor for the benefit of creditors to whom the conveyance is not communicated, and who are not in any manner privy to it, will not be good against the other creditors; for such a deed merely operates as a power which is revocable by the debtor, and is merely a direction by him as to the mode in which his own property shall be applied for his own benefit; and the creditors generally, or the creditors named in the schedule, are merely persons named there for the purpose of showing how the trust property under the voluntary deed shall be applied for the benefit of the volunteers (*v*).

If a creditor has executed the deed, and been a party to it, and assented to it, if he has entered into obligations on the faith of it, these acts give him a right; but such right does not enure for the benefit of any other person who has not executed it, who is not a party, and who has not assented to it (*w*).

Executors or administrators may assign for general creditors;

An executor or administrator has as much power to defeat a particular execution by an assignment for the general benefit of all the creditors, on the principle of *Pickstock* v. *Lyster* (*x*); as *his testator, if still [*108] living, would have had (*y*); which, in fact, comes to much the same as if the executor were to renounce probate in favour of an administrator chosen by the creditors. An executor of a debtor can also revoke the trusts of a deed as against a creditor, although a party to the deed, who never executed it, and to whom it was never communicated (*z*). An executor may also confess judgment to a particular creditor, in order to give him a preference (*a*), on the principle of *Holbird*

and may give preference by confessing judgment.

(*u*) *Blenkinsopp* v. *Blenkinsopp*, 12 Beav. 568, S. C. 1 De G. M. & G. 495; *Bott* v. *Smith*, 21 Beav. 511; *Barling* v. *Bishop*, 29 Beav. 417; *Reese Silver Mining Co.* v. *Atwell*, L. R. 7 Eq. 347; *Ex parte Games*, 12 Ch. D. 323; ante, p. 72.

(*v*) *Walwyn* v. *Coutts*, 3 Mer. 707; *Harland* v. *Binks*, 15 Q. B. 713; *Garrard* v. *Lord Lauderdale*, 2 Russ. & My. 451; *Acton* v. *Woodgate*, 2 My. & K. 492; et infra, p. 433 et seq.

(*w*) *Johns* v. *James*, 8 Ch. D. at p. 750.

(*x*) 3 M. & S. 371; and see *Earl Vane* v. *Rigden*, L. R. 5 Ch. 668.

(*y*) *Wolverhampton, &c., Banking Co.* v. *Marston*, 7 H. & N. 148.

(*z*) *In re Sanders*, 47 L. J. (N.S.) Ch. 667.

(*a*) *Williams* v. *Fowler*, Str. 407–410; *Lyttleton* v. *Cross*, 3 B. & C. 322.

v. *Anderson* (*b*), or may give a preference to any particular creditor by an assignment or mortgage to him of any part of the testator's assets in payment of, or by way of security for, his debt (*c*).

Position of executor or adminstrator how different from that of debtor.

In some respects, however, an executor or administrator is in a different position from that of a living debtor with regard to creditors. He has only a limited power over the assets of his testator; not the right of absolute ownership, but nothing more than a temporary possession for the purpose of distribution, and may be regarded as a trustee for those who are interested in the distribution.

But only between creditors of equal degree.

An executor or administrator may, even after actions are commenced against him by a simple contract creditor, confess judgment in favour of another creditor of equal degree (*d*); but it is only between creditors of equal degree that he can pay one in preference to another; and that only up to the time judgment has been obtained in a creditor's administration action. But he cannot after the appointment of a receiver in such action make any payment to a creditor (*e*).

An executor or administrator cannot do what it was held the debtor could do in *Holbird* v. *Anderson* (*f*)—viz., after one creditor has obtained judgment, but before execution, confess judgment to another creditor, so [* 109] as to enable him to put in his *execution first, and defeat the first judgment. After the debtor's death the race is for obtaining judgment, but while he lives nothing short of actual satisfaction, apart from the bankrupt laws, will oust the debtor's right of preference; for the rule as to creditors of unequal degrees does not apply inter vivos (*g*).

In confessing judgment, not for the benefit of all the creditors rateably, the executor or administrator will

(*b*) 5 T. R. 235; see also *Mackreth* v. *Jackson*, 1 M. & S. pt. 2, 408 n.

(*c*) *Earl Vane* v. *Rigder*, L. R. 5 Ch. 663.

(*d*) *Blundivell* v. *Loverdell*, 1 Sid. 21; *Prince* v. *Nicholson*, 1 Mars. 280, 5 Taunt. 333; *Lyttleton* v. *Cross*, 3 B. & C. 322; *Parkes* v. *Dee*, 3 Sw. 531; *Larkins* v. *Paxton*, 2 Beav. 219.

(*e*) *Darston* v. *Lord Orford*, Colles, 229; *Maltby* v. *Russell*, 2 S. & S. 227; *In re Radcliffe*, 7 Ch. D. 733.

(*f*) 5 T. R. 235.

(*g*) *Holbird* v. *Anderson*, 5 T. R. 239; *Middleton* v. *Pollock*, 2 Ch. D. 104.

not, it is apprehended, be allowed to exhaust the whole estate for the benefit of one creditor (*h*); but he will be restrained to the amount of the actual debt due to the creditor to whom the judgment was confessed (*i*).

Totputt v. *Wells*.

In *Tolputt* v. *Wells* (*i*) an executrix confessed judgment to a creditor of her testator as well for his own debt as for those of several others of the creditors. It was held that this judgment could not be pleaded in bar to an action brought against her by another creditor of the testator, who was not a party to, and whose debt was not provided for in, the judgment confessed. Lord Ellenborough said (*k*), unless an executor might confess a judgment, his operations and duties might be suspended and paralyzed by one creditor protracting his suit. To avoid this he may confess a judgment, but it must be to a creditor, not a stranger. "Now in this case Monday is a stranger quoad all but £9. If, then, this judgment be good, it would go the length of enabling an executor to confess judgment to a creditor, who claimed a debt of 1*s.* only, to the extent of £10,000, provided the testator's debts amounted to so much, and this would not be beneficial either to the executor or the creditor."

Reconcilable with *Meux* v. *Howell*.

It has been said (*l*) that this overrules what was said by Lawrence, J., in *Meux* v. *Howell* (*m*): "May not a person, indebted to several, without the imputation of fraud confess a judgment to a trustee, to enable him to take all his property for the benefit of all his creditors equally? Does not a court of equity act on the same principle in the distribution of assets?" *But [*110] it is submitted that they are in unison. In *Tolputt* v. *Wells* (*i*) the judgment was not confessed for the benefit of all the creditors equally; the debt of the creditor who was allowed to upset it was not provided for; and it has been shewn that there is some difference between the case of a debtor himself confessing judgment, and that of his executor doing so after his decease (*n*).

After judgment for administration executor cannot prefer.

After judgment in an administration action, an executor is not at liberty to do any act which affects the relative rights of creditors (*o*), and cannot, therefore, waive

(*h*) See ante, pp. 94, 95; *Earl Vane* v. *Rigden*, L. R. 5 Ch. 668.
(*i*) 1 M. & S. pt. 2, 395. (*k*) Ibid. p. 402.
(*l*) 2 Wms. Ex. 8th ed. 1039, n. (*y*). (*m*) 4 East, 9.
(*n*) Ante, p. 108.
(*o*) *In re Radcliffe*, 7 Ch. D. 733.

his right not to pay a debt barred by the Statutes of Limitation (*q*); but he may do so before judgment (*r*).

Whole transaction must be free from doubt.

In all cases of this nature, where the consideration is a *pre-existing* debt alone, or a *pre-existing* debt and a further advance or advances, the whole transaction must be free from doubt.

Debt must be proved;

and the bona fides.

The question always is, first, whether there was a bonâ fide debt (*s*); and next whether it was intended by these means to pay or secure the debt, or whether the transaction was a mere cloak by which the debtor intended to secure a benefit to himself (*t*).

But a benfit or interest left in the debtor will not necessarily make it fraudulent.

But a deed will not be void merely because an interest in the property is retained by the debtor. So where (*u*) A. by deed assigned all his effects at W. to trustees for the benefit of certain creditors for four years, with power of sale after two years, or before, if A. should so direct, the proceeds to be applied in discharge of the debts of those creditors, and they covenanted not to molest A. for two years, it was held that this assignment was valid, and not within 13 Eliz. c. 5, and good against an execution subsequently sued out. And the [* 111] mere fact of the * settlor possibly taking some benefit under the settlement to the exclusion of creditors (as where the settlement was to trustees to pay the income for the benefit of the settlor, his wife and children, in such way as they in their discretion should think fit) has been held not to avoid a deed which was not voluntary, but as to which there was not perfect bona fides on the part of the settlor (*v*). The settlement was supported on the ground of its being a transaction for value, in which the purchaser had no notice or knowledge of the bad faith of the settlor (*w*).

Settlor taking some benefit.

(*q*) *Shewen* v. *Vanderhorst*, 2 Russ. & My. 75.

(*r*) *Budgen* v. *Sage*, 3 My. Cr. 683.

(*s*) *Bunyard* v. *Seabrook*, 1 F. & F. 321; *Michael* v. *Gay*, 1 F. & F. 409; and see *Follett* v. *Wesley*, 10 Jur. 327.

(*t*) *Holbird* v. *Anderson*, 5 T. R. 235: *Eveleigh* v. *Purssford*, 2 M. & Rob. 539; *Pickstock* v. *Lyster*, 3 Man. & S. 371; *Middleton* v. *Pollock*, 2 Ch. D. 104; *Ex parte Games*, 12 Ch. D. 314; *Ex parte Chaplin*, 26 Ch. D. 319.

(*u*) *Goss* v. *Neale*, 5 J. B. Moo. 19, 21; and see *Holmes* v. *Penney*, 3 K. & J. 90, 100; *Boldero* v. *London and Westminster Loan and Discount Co.*, 5 Ex. D. 47; *Green* v. *Brand*, Times Rep. (1884), 79.

(*v*) *Holmes* v. *Penney*, 3 K. & J. 90, 100.

(*w*) *Codagan* v. *Kennett*, Cowp. 432, 435; *Riches* v. *Evans*, 9 C. & P. 640; *Alton* v. *Harrison*, L. R. 4 Ch. 626; *Smith* v. *Hurst*, 10 Hare, 30, 45. See ante, pp. 78, 79.

Question always whether transaction is *bonâ fide*.

In all cases the question is as to the *bona fides* of the transaction. If the deed is executed honestly for the purpose of giving a security to creditors, or of putting the property out of the grantor's control (*x*), it is good; but if it is a contrivance resorted to for his own personal benefit it is void and has no effect (*y*).

Power of revocation strong mark of fraud.

It is not, therefore, surprising to find that a power of revocation inserted in a deed has always been looked upon as a strong circumstance of fraud, and will in general make a deed void under this statute (*z*), although it contains no express provision avoiding conveyances with powers of revocation as against creditors (*a*). The effect of such a power is of course to enable the settlor to deal with the property after having affected to convey it away.

Though not in express terms.

And where there is a de facto power of revocation, although not in express terms (as a power to mortgage to any extent), it is equally fraudulent against creditors (*b*).

So where (*c*) a husband and wife joined in settling property *at their decease on their children at [* 112] twenty-one, with a power of revocation, with the consent of the trustees, in the event of the birth of another child, and another child was born a few months afterwards, Lord Hatherly (then Sir W. P. Wood, V. C.), after commenting on the embarrassed circumstances of the settlor and questioning whether there was any consideration for the settlement moving from the wife, said: "She had a joint power over Q., but the ground on which I proceed is this: the deed contains an extraordinary limitation, that all the limitations may be set aside if any future children should be born; and it is clear that at that time there must have been an expecta-

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(*x*) *Holmes* v. *Penney*, 3 K. & J. 90; *Goss* v. *Neale*, supra; *Middleton* v. *Pollock*, 2 Ch. D. 108, 109; *Ex parte Games*, 12 Ch. D. 314.

(*y*) Ante, pp. 11, 96, 97; *Spencer* v. *Slater*, 4 Q. B. D. 13; *Ex parte Chaplin*, 26 Ch. D. 319.

(*z*) *Holcraft's Case*, Dyer, 203 a; *Garth* v. *Ersfield*, Sir J. Bridg. 22; *Rex* v. *Nottingham*, Lane, 42; *Bethel* v. *Stanhope*, 2 Cro. Eliz. 810; *Jenkyn* v. *Vaughan*, 3 Drew. 419, 427; *Smith* v. *Hurst*, 10 Hare, 30. See ante, p. 32. This appears also to be the law in America: see Bump. Fr. Conv. Amer., 2nd ed. 216.

(*a*) And see under 27 Eliz. c. 4, s. 5, post, pp. 209 et seq.

(*b*) *Tarback* v. *Marbury*, 2 Vern. 510. But as to the terms of the power, see note (3rd ed).

(*c*) *Acraman* v. *Corbett*, 1 J. & H. 410.

tion of a child being born. The intention, therefore, appears plainly to have been to stave off a pressing emergency and nothing more. It is impossible to say that any interest in the wife could sustain a deed of that character.

For particular purpose.

But a power to revoke for a particular purpose may not make such a deed void (*d*).

(*d*) See *Hungerford* v. *Earle*, Freem. Ch. 120; and as to purchasers, *Jenkins* v. *Keymis*, 1 Lev. 150, Hardr. 395, post, p. 214.

CONTINUANCE IN POSSESSION—HOW FAR A MARK OF FRAUD.

Possession not given is frequently a mark of fraud.

THE fact of possession not being taken by a purchaser or donee when the sale or gift has apparently been completed is frequently a mark of fraud. This is so because it is evidence that the purchase or gift was never intended to have any real operation according to its apparent character and effect (*e*), either that there should be no substantial change of ownership, or that there was a secret understanding in favour of the donor (*f*).

There are two leading distinctions to be carefully borne in mind in the consideration of this question.

The first distinction is, what is the *nature* of the property?

Difference between real and personal property.

The principle which governs transfers of interests in land differs from that which governs transfers of personal chattels (*g*). Personal chattels pass by actual delivery (*h*), and ostensible possession is a tacit assertion of ownership on the faith of which credit may naturally be given; tradesmen may be induced thereby to supply goods, and debts may be contracted. But with interests in land it is otherwise; no inference of absolute ownership is necessarily deducted from the occupation of a house or farm; in fact, more frequently than not, the actual occupier has but a very limited interest in the land. In the case of goods and chattels, possession alone is a primâ facie title (*i*), and in the ab-

(*e*) *Twyne's Case*, 3 Rep. 80 b; *Hale* v. *Saloon Omnibus Co.*, 4 Drew. 492.

(*f*) See Coke's advice to creditors taking gifts in satisfaction of their debts, 3 Rep. 81 a; *Ex parte Chaplin*, 26 Ch. D. 319; and post, p. 217.

(*g*) So also in U. S. of America: *Phettiplace* v. *Sayles*, 4 Mason, 312, 321; and see Bump. Fr. Conv. (Amer.), 2nd ed. 122, 177.

(*h*) *Cadogan* v. *Kennett*, Cowp. 434; *Ward* v. *Audland*, 16 M. & W. 870; *Shower* v. *Pilck*, 4 Ex. 478; *Flory* v. *Denny*, 7 Ex. 583; post, pt. v. ch. ii.

(*i*) *Phillips* v. *Eamer*, 1 Esp. 355-358; *Arundell* v. *Phipps* 10 Ves. 139, 145.

sence of other circumstances is held out to the world [* 114] as a good title; whereas * the occupation of land can be shewn to be the possession of ownership or not by the title deeds alone, so that it is to them, and to whose possession they are in, that others have to look before giving credit.

Mortgage of land.

A mortgage of land without fraud can never be fraudulent, merely because the mortgagor remains in possession (*k*); but the possession of *goods* not going with the title has always been admitted as a badge of fraud (*l*); and the more nearly a chattel approaches in its nature to an interest in land the less is want of possession an argument of fraud (*m*).

Chattels transferred without delivery.

But even for a valid transfer of property in chattels actual possession is not in all cases necessary (*n*); and in general the fact that after the transfer the possession remains in the transferor is only *primâ facie* evidence of fraud (*o*). Where, for instance, land is mortgaged with the chattels on it, it is not in the nature of the transaction that actual possession of the land should be given to the mortgagee, and his constructive possession of the land will, it seems, be sufficient to prevent the mortgage from being void against creditors, even as to the chattels, from the want of actual possession (*p*). And the same is the case in a mortgage of fixtures, other than trade machinery, together with the freehold by the owner of the freehold, which does not, so far as regards the fixtures, require to be registered (*q*) as a bill of sale (*r*).

Want of possession primâ facie evidence of fraud.

Mortgage of chattels with land.

So there is now no presumption of fraud if the mortgagor retain possession of fixtures, whether consistently

(*k*) *Lady Lambert's Case*, Shep. Touch. 65; *Stone* v. *Grubham*, 2 Buls. 225.

(*l*) *Neate* v. *Latimer*, 2 Y. & C. Ex. 257, per Lord Abinger, at p. 263.

(*m*) *Steward* v. *Lombe*, 1 Brod. B. 506, 511.

(*n*) *Martindale* v. *Booth*, 3 B. & Ad. 498; *Kidd* v. *Rawlinson*, 2 B. & P. 59; *Watkins* v. *Birch*, 4 Taunt. 823; *Meyerstein* post, v. *Barber*, L. R. 2 C. P. 51; pt. v. ch. ii.

(*o*) *Arundell* v. *Phipps*, 10 Ves. 139; *Kidd* v. *Rawlinson*, 2 B. & P. 59; *Hoffman* v. *Pitt*, 5 Esp. 22–5; *Eastwood* v. *Brown*, Ry. & Mood. 312; *Martindale* v. *Booth*, 3 B. & Ad. 498; *Carr* v. *Burdiss*, 5 Tyrw. 309; post, pp. 121, 122.

(*p*) *Steward* v. *Lombe*, 1 Brod. & B. 506–11.

(*q*) Under 41 & 42 Vict. c. 31, ss. 4, 7; 45 & 46 Vict. c. 43; see post, p. 149, and Appendix Nos. III., IV.

(*r*) *Mather* v. *Fraser*, 2 K. & J. 536; see *Ex parte Moore and Robinson's Banking Co.*, 14 Ch. D. 379; post, p. 149.

with the deed or not; because they pass like real estate by title, and possession is no ground from which to infer ownership. So, unless fixtures * are severed, [* 115] they are not within the order and disposition of a person within the meaning of the Bankruptcy Act (*s*).

If such possession as was possible was given it is enough.

Where such a possession as the nature of the case admits has been given and taken at the time of the transfer, that is sufficient (*t*).

Bonds require delivery.

Book debts not.

For instance, "if a bond is assigned the bond must be delivered, and notice must be given to the debtor; but in assignments of book debts notice alone is sufficient, because there can be no delivery; and such acts are equal to a delivery of goods which are capable of delivery" (*u*).

Possession of realty different from possession of personalty.

As to this difference between real and personal property, it was said in *Ryall* v. *Rolle* (*v*), "Possession can be no otherwise a badge of fraud than as it is calculated to deceive creditors. As to the possession of goods, I have no other way of coming to the knowledge of the owner but by seeing who is in possession of them; but the possession of land is of a different nature, for a man may be in possession of lands as a tenant at will, as a mortgagor is to the mortgagee, before the condition broken. A purchaser may call for the title deeds, and need not be deceived unless he will; but this is not the case of goods where they are left in the possession of the seller."

When want of possession of land may be fraudulent.

But though with respect to land the question whether actual and visible possession is or is not taken is in general of no great importance, yet where there is such a continuance in possession as to prevent any substantial change of ownership the case is different. In *Russell* v. *Hammond* (*w*), Lord Hardwicke said it was a plain badge of fraud that the settlor took back an annuity to himself and his wife for life of £27, which was

(*s*) *Ex parte Barclay*, 5 De G. M. & G. 403; *Holland* v. *Hodgson* L. R. 7 C. P. 328; and see Robson, Bkcy. 5th ed. 532.

(*t*) *Atkinson* v. *Maling*, 2 T. R. 462; *Manton* v. *Moore*, 7 T. R. 71; *Gough* v. *Everard*, 2 H. & C. 1, 8; *Mair* v. *Glennie*, 4 M. & S. 240; post, pp. 123, 124.

(*u*) Per Lord Macclesfield (then Sir Thomas Parker) in *Ryall* v. *Rolle*, 1 Atk. 177, S. C. *Ryall* v. *Rowles*, 1 Ves. 367.

(*v*) 1 Atk. 165, 168, S. C. 1 Ves. 348, 360; and see per Lord Mansfield in *Worsley* v. *Demattos*, 1 Burr. 477, 483.

(*w*) 1 Atk. 13, 16; post, pp. 122 et seq.

probably the full value of the estate comprised in the deed, and the father gave the son nothing; which is almost tantamount to a continuance in possession, and has always been deemed a strong circumstance of fraud.

Mere fact of possession of *real* estate after sale or mortgage no evidence of fraud.

[* 116] *In general, the mere fact that the vendor or donor has, after a sale or gift, retained possession of the land, does not of itself raise even a *primâ facie presumption* of fraud. For that possession may properly be in one person and the legal title in another person. It is to the possession of the title deeds of real estate that creditors ought to look (*x*).

Where virtual and substantial possession of land is retained by retaining the title deeds, much the same rules are applicable as to sales of personalty (*y*).

Is transfer of *personal* property absolute or conditional?

The second leading distinction in the consideration of this question is whether the sale or gift of the *personal* property is absolute or conditional (*z*).

Is mere fact of absolute transfer primâ facie evidence of fraud?

With regard to an absolute sale or gift of *personal* property there has been a considerable conflict of authority as to whether the mere fact of retention of possession by the vendor or donor of itself afforded *conclusive* or merely *primâ facie presumptive* evidence of fraud.

Ryall v. *Rolle* (*a*), though a case on the 21 Jac. 1, c. 19, was argued on the general question of possession. It was there said, in relation to the condition of creditors where the debtor continues in possession of the goods mortgaged, that the statute governing this matter was 13 Eliz. c. 5, in which there was no distinction whether the sale be absolute or conditional, provided it was fraudulent. Courts of equity and juries were to consider, upon the whole evidence, whether the conveyance was made with a view to defraud or not; conveyances for value were good, "unless the circumstances have the appearance of a design to deceive creditors; but where the goods have been left with the vendor so notoriously as that there could be no design

(*x*) Ante, pp. 113, 114. The same is the rule in America: see Bump. Fr. Conv. (Amer.), 2nd ed. 122, 177.

(*y*) See *Doe* v. *Ball*, 11 M. & W. 531; and see *Perry-Herrick* v. *Attwood*, 2 De G. & J. 21; *Clarke* v. *Palmer*, 21 Ch. D. 124; post, p. 197.

(*z*) Post, p. 122.

(*a*) 1 Atk. 165, 167–8, S. C. *Ryall* v. *Rowles*, 1 Ves. 348, 360.

to defraud, this has never been looked upon as fraudulent." With regard to *Twyne's Case* (*a*), it was said that "it is hard to assign a reason why a buyer should leave goods in the hands of the seller unless *to [* 117] give him a false appearance of circumstances and credit," but that "possession can be no otherwise a badge of fraud than as it is calculated to deceive creditors."

In *Bucknal* v. *Roiston* (*b*) Lord Cowper made no distinction between absolute and conditional sales, but decided on the fairness of the transaction, saying that there was no possession calculated to acquire a false credit. This shewed that a possession so calculated as to acquire a false credit would have made the transaction void, and that this must mean such possession as would give false credit, so that all that is laid down there is that a possession to acquire a false credit would make such a transaction void, otherwise not.

This doctrine was closely followed by Lord Mansfield in *Worsley* v. *Demattos* (*c*), who there pointed out that the not taking possession, since it was only *evidence* of fraud, might be explained.

Want of possession conclusive evidence of fraud only when it proves the unreality of the transfer.

In some of the older cases it has been held that the want of possession alone is of itself a conclusive proof of fraud (*d*), that is to say, where it is enough to shew that the transfer was not a real sale or gift at all, but a mere contrivance, whereby no property was intended to pass, but which should be brought forward when convenient in order to protect the goods from the claims of creditors. It was chiefly on this ground that the sale in *Twyne's Case* (*a*) was held void for there "the donor continued in possession and used the goods as his own, and traded and trafficked with others and defrauded and deceived them" (*f*).

Old rule as to possession after transfer being evidence of fraud.

The old rule seemed to be that where there was an absolute conveyance and the grantor remained in possession in such a way as to be able to use the goods as

(*a*) 3 Rep. 80 b.
(*b*) Prec. Ch. 285.
(*c*) 1 Burr. 467.
(*d*) *Stone* v. *Grubham*, 2 Buls. 226.
(*f*) Per Sir W. Fortescue, in *Taylor* v. *Jones*, 2 Atk. 600; and see *Ryall* v. *Rowles*, 1 Ves. at p. 360; and see *Ex parte Games*, 12 Ch. D. 322.

his own, it was always void against creditors, even though made on valuable consideration (*g*). In such a case to remain in possession was either inconsistent with the deed and therefore fraudulent, or, if in accord-
[* 118] ance with the terms * of the deed, was none the more valid, for it proved, or was taken to prove, the unreality of the transfer, and that it was intended to be really for the grantor's benefit at the expense of his creditors (*h*). But the possession of an assignor is not fraudulent when he is tenant in common with the purchaser, because the possession of one tenant in common is the possession of all (*i*).

But where it is attempted to screen more property than necessary, it is question for jury.

Want of absolute possession will make a bill of sale fraudulent if the ulterior object is to convey more property than would satisfy the debt to secure which it was given, in order to screen it from other creditors (*k*); but whether or not this was the object is a question for a jury, especially where the value of the property was a fluctuating one.

In all cases where there is a lease, bill of sale, or other assignment, without any change of possession, the question is, whether it was a bonâ fide transaction or a trick and contrivance; and the payment of the consideration money and other circumstances must be free from doubt (*l*), for any circumstances of fraud coupled with the transferor's remaining in possession will upset a transaction (*m*).

It by no means follows, though, that because there is

(*g*) *Bucknal* v. *Roiston*, Prec. Ch. 287; *Edwards* v. *Harben*, 2 T. R. 587; *Twyne's Case*, 3 Rep. 80 b; *Paget* v. *Perchard*, 1 Esp. 205.

(*h*) The idea that a secret benefit was intended for the grantor in contradiction of the apparent grant, is the leading principle on which these conveyances are void. The earlier statute, 3 Hen. 7, c. 4, enacted that "all deeds of gift of goods and chattels made or to be made of trust *to the use of that person or persons* that made the same deed of gift be void, and of none effect;" and see the fifth badge of fraud in *Twyne's Case*, 3 Co. 81 a; and the resolution (ibid.) that no gift shall be considered bonâ fide which is accompanied with any trust; and so "the want of delivery is evidence only that the transfer was *colourable*": *Martindale* v. *Booth*, 3 B. & Ad. 498, 505; *Lindon* v. *Sharp*, 6 Man. & G. 895, 898.

(*i*) *Re Matthews*, 1 Atk. 185.

(*k*) *Benton* v. *Thornhill*, 2 Mars. 427. And it will be seen that this was also the case in *Edwards* v. *Harben*, 2 T. R. 587, post, p. 119; *Biddulph* v. *Goold*, 11 W. R. 882.

(*l*) *Reed* v. *Blades*, 5 Taunt. 212; *Ex parte Games*, 12 Ch. D. 314.

(*m*) *Graham* v. *Furber*, 14 C. B. 410.

no possession given therefore a transfer is fraudulent; for those cases where the judges have said that if possession was not given it was fraudulent (*n*) must be taken with reference to the circumstances of each case.

But no possession is not always fraudulent.

The question of possession is one of much importance, but * that is with a view to ascertain the [* 119] good or bad faith of the transaction (*o*).

In *Arundell* v. *Phipps* (*p*) Lord Eldon said that the mere circumstance of the possession of chattels, however familiar it might be to say that it proves fraud, amounts to no more than that it is *primâ facie* evidence of property in the man possessing, until a title not fraudulent is shewn under which that possession has followed; that every case, from *Twyne's Case* (*q*) downwards, supports that, and there was no occasion otherwise for the statute of King James (*r*).

Lord Eldon: want of possession only primâ facie evidence of fraud, and *all* the circumstances must be considered.

There is no sufficient authority for saying that the want of delivery of possession makes void a bill of sale of goods and chattels; it is primâ facie evidence of a fraudulent intention, and, if it be a badge of fraud only, in order to ascertain whether a deed be fraudulent or not, all the circumstances must be taken into consideration (*s*).

Edwards v. *Harben*, (*t*) is an early case on the subject, the facts of which sufficiently appear from the judgment. The Court of King's Bench held the bill of sale to the defendant fraudulent and void against the plaintiff, another creditor.

Edwards v. *Harben*.

Buller, J., said the bill of sale was a general bill of sale of all the defendant's household furniture and stock-

Absolute bill of sale.

(*n*) *Edwards* v. *Harben*, 2 T. R. 587; *Wordall* v. *Smith*, 1 Camp. 332; *Macdona* v. *Swiney*, 8 Ir. C. L. R. 86.

(*o*) Abbott, C.J., in *Latimer* v. *Batson*, 4 B. & C. 652; and see *Arundell* v. *Phipps*, 10 Ves. 139; *Kidd* v. *Rawlinson*, 2 B. & P. 59; *Hoffman* v. *Pitt*, 5 Esp. 22, 25; *Eastwood* v. *Brown*, Ry. & Mood. 312.

(*p*) 10 Ves. 139, 145.

(*q*) 3 Rep. 80 b; see the remarks of Littledale, J., in *Martindale* v. *Booth*, 3 B. & Ad. 498, 505.

(*r*) 21 Jac. 1, c. 19, ss. 10, 11, which originated the law with respect to property remaining in the reputed ownership or order and disposition of a bankrupt.

(*s*) Per Patteson, J., in *Martindale* v. *Booth*, 3 B. & Ad. 498, 507; post, pp. 150 et seq.

(*t*) 2 T. R. 587.

in-trade; it was to take effect immediately on the face of it; but there was an agreement between W. T. M. and the defendant that the goods should not be sold till the expiration of fourteen days from the date of its execution; and no possession was actually taken by the defendant till after the death of W. T. M., which happened within the fourteen days. There was a formal delivery of a corkscrew in the name of the whole (*u*). The first question, whether the bill of sale be void or [* 120] not, came before the Court in * the last term in the case of *Bamford* v. *Baron*, in which all the judges were unanimously of opinion that unless possession *accompanies and follows* the deed it is fraudulent and void. Stress is laid on the words "accompanies and follows," because there are some cases in which, though possession was not delivered at the time, the conveyance was not held to be fraudulent. There are many cases on the subject, from which it appears that the principle stated never admitted of any serious doubt. So long ago as the case in Bulstrode (*v*) the Court held that an absolute conveyance or gift of a lease for years unattended with possession, was fraudulent, but if the deed or conveyance be *conditional*, then the vendor's continuing in possession does not avoid it, because, by the terms of the conveyance, the vendee is not to have the possession till he has performed the condition (*w*); and so with bills of sale. Buller, J., then proceeded: "This has been argued by the defendant's counsel as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se* as makes the transaction fraudulent in point of law; that is the point which we have considered, and we are all of opinion that *if there be nothing but the absolute conveyance without the possession, that, in point of law, is fraudulent*" (*x*).

Deed void unless possession accompanies and follows it.

Where there is nothing but absolute conveyance without possession it is fraudulent.

(*u*) But the property in the goods, if at all, passed by the mere execution of the deed: *Burling* v. *Patterson*, 9 C. & P. 574.

(*v*) *Stone* v. *Grubham*, 2 Buls. 226.

(*w*) But see *Bucknal* v. *Roiston*, Prec. Ch. 285, and *Ryall* v. *Rolle*, 1 Atk. 165, S. C. *Ryall* v. *Rowles*, 1 Ves. 348, ante, pp. 116, 117.

(*x*) In America the doctrine of *Edwards* v. *Harben* has been fully adopted and even exceeded in some courts and States; see *Hamilton* v. *Russel*, 1 Cranch (Sup. Ct. of U. S. Rep.), 309; *Conard* v. *Atlantic Insurance Co.*, 1 Peters (Sup. Ct. of U. S. Rep.), 386, 449: *Bissell* v. *Hopkins*, 3 Cowen (Supt. Ct. of N. Y.), 166, 189 n; *United States* v. *Hooe*, 3 Cranch (Sup. Ct. of U.S.), 73; *Meeker* v. *Wilson*, 1 Gallison (U.S. Circ. Ct.), 419; *D'Wolf* v. *Harris*, 4 Mason (U.S. Circ. Ct.), 515, 534: *Sturtevant* v. *Ballard*, 9 Johns (N.Y. Rep.), 337, where, too, the consideration was

In *Haselinton* v. *Gill* (*y*), decided, three years before *Edwards* * v. *Harben*, (*z*), by Buller, J., [* 121] it was laid down that "possession alone is not evidence of fraud, but that the transaction must be shewn to be fraudulent from other circumstances."

It will be observed, however, that the words of Buller, J., in *Edwards* v. *Harben* (*z*), apply where there are no facts whatever in the case beyond those of an absolute conveyance and a non-delivery of possession. Such a case is, from the nature of the transaction, very exceptional. This case has given rise to much comment in subsequent cases, and, although never actually overruled, the principle laid down in it has since been modified considerably. There were in it, however, other circumstances of fraud—the generality of the assignment and the fact that more property was assigned than necessary to cover the debt (*a*).

In *Martindale* v. *Booth* (*b*) the doctrine laid down by Buller, J., was repudiated by the whole Court, and continuance in possession was treated as *evidence* of fraud only to be left to the jury that the transaction was colourable. It was said in that case by Parke, J.: "I think that the want of delivery of possession does not make a deed of sale of chattels absolutely void. The dictum of Buller, J., in *Edwards* v. *Harben* (*z*) has not been generally considered, in subsequent cases, to have that import. The want of delivery is only evidence that the transfer was colourable."

In *Lindon* v. *Sharp* (*c*) Tindal, C. J., said: "The modern doctrine is that it must be left to the jury to say

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money paid at the time; 2 N.Y. Rev. Stats. 136, ss. 5, 6, 7; *United States* v. *Conyngham*, 4 Dallas, (U.S.), 358, Wallace C. C. 178; *Phettiplace* v. *Sayles*, 4 Mason (U.S. Circ. Ct.), 312, 321; *Kennedy* v. *Ross*, 2 Const. (S.C.) 125; and *Clow* v. *Woods*, 5 Serg. & Rawle (Pennsylv.), 275. But in others a less strict rule—that want of possession is only primâ facie evidence of fraud—has obtained. See *Brooks* v. *Powers*, 15 Mass. Rep. 244; *Bartlett* v. *Williams*, 1 Pick. (Mass.), 288; *Briggs* v. *Parkman*, 2 Metcalf (Mass.), 258; *Carpenter* v. *Snelling*, 1 Browne (Mass.), 452; *Gates* v. *Mowry*, 15 Gray (Mass.), 564; *Ulmer* v. *Hills*, 8 Greenl. (Maine), 326; *Wash* v. *Medley*, 1 Dana (Kentucky), 269. But see *Laughlin* v. *Ferguson*, 6 Dana (Kky.), 117. See Kent, 12th ed. 520; Bump. Fr. Conv. (Amer.), 2nd ed. 64, 74 et seq., 111-114, and cases there cited.

(*y*) 3 T. R. 620. (*z*) 2 T. R. 587; ante, p. 119.
(*a*) *Benton* v. *Thornhill*, 2 Mars. 427, 7 Taunt. 149.
(*b*) 3 B. & Ad. 498. (*c*) 6 M. & Gr. 898.

whether the continuance in possession is fraudulent or not. It is a strong fact, but not conclusive."

In the Irish Courts, in the case of *Macdona* v. *Swiney* (*c*), Lefroy, C. J., pointed out that the principle laid down in *Edwards* v. *Harben* (*d*) by the judges was only intended to apply to possession under the particular circumstances of that case.

Modern doctrine possession after a transfer merely a primâ facie presumption of fraud.

The more modern doctrine, then, appears to be that the mere fact of the vendor's or donor's continuance in possession of *personal* property after an absolute sale [* 122] or gift affords only a **prima facie presumption* of fraud. It is such a presumption, therefore, as may be explained away or rebutted; or, taken in connection with all the circumstances of the case, it may amount to a conclusive presumption of fraud. In short, the question of fraud or no fraud depends upon all the special circumstances of each particular case.

Distinction between absolute and conditional transfers.

Although in some of the very early cases no distinction has been made between absolute and conditional transfers of *personal* property but they have been treated as the same in principle (*e*), still this distinction was recognized in *Edwards* v. *Harben* (*f*), where it was said by Buller, J., with regard to deeds or bills of sale which are to take place *at some future time*, that "the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed, and such possession comes within the rule *as accompanying and following the deed.*"

Possession accompanying and following the deed.

This criterion, whether possession accompanies and follows the deed, is only one means of ascertaining whether it was a bonâ fide deed, intended to part with the property, or whether it was intended that the debtor should keep possession and have his goods back again, and that it was a mere pretext for keeping off creditors (*g*); and the question whether or not possession was given—the manner in which the parties to the deed acted with regard to it after its execution—is always important as throwing light on their original intention (*h*).

(*c*) 8 Ir. C. L. 73, 84, 86. (*d*) 2 T. R. 587; ante, p. 119.
(*e*) Ante, pp. 116, 117.
(*f*) 2 T. R. 587; see notes to *Twyne's Case*, 1 Sm. L. C. 8th ed.
(*g*) *Riches* v. *Evans*, 9 C. & P. 640; *Martindale* v. *Booth*, 3 B. & Ad. 505; *Evelcigh* v. *Purssford*, 2 Mood. & Rob. 539, 542.
(*h*) *Armstrong* v. *Baldock*, Gow, 33; *Reeves* v. *Capper*, 5 Bing. N. C. 140; *Carr* v. *Burdiss*, 5 Tyrw. 309.

In *Martindale* v. *Booth* (*i*), "the consideration for the bill of sale," said Lord Tenderden, C.J., "was not only an antecedent debt, but a sum of money to be advanced by the plaintiffs to enable Priest to carry on his trade. The omission of the plaintiffs to take possession of the goods was perfectly consistent with the deed; for it was stipulated that Priest should continue in possession until default made in payment of all or any of the instalments. . . . . The possession by Priest, therefore, being consistent *with the deed, [* 123] and it having been giving in consideration of money advanced to enable Priest to carry on his trade, I cannot say that it was absolutely void."

So in *Alton* v. *Harrison* (*k*) a bill of sale by way of mortgage of substantially all the mortgagor's property for the benefit of certain creditors, with a proviso that he should retain possession for six months unless a sequestration or execution should issue against him, was held valid. The ground of this decision was that the proviso was consistent with the tenor and object of the deed, although the mortgagor knew that a writ of sequestration would be issued against him.

In general, where property is mortgaged, especially if it be such as an hotel, or the plant of a manufactory, it is the object of the parties to the deed to leave the mortgagor in undisturbed possession until default in payment. The source from which the mortgagee's interest is to come is frequently the earnings of the mortgagor in his business, which would be destroyed by an immediate change of possession (*l*). Indeed, the general idea of of a mortgage, even where the mortgagor does not by means of the property mortgaged earn money, is that the property shall remain in the undisturbed possession of the mortgagor, with a right reserved to the mortgagee, in certain events, to take possession.

Where continuance in possession is in pursuance of the deed no presumption of fraud.

The result of the authorities appears to establish this: that where, in strict pursuance of the terms of the agreement or deed, actual possession is not given, such want of possession is not per se *even* an evidence of fraud.

In such a case the fraud against creditors must be

(*i*) 3 B. & Ad. 498.
(*k*) L. R. 4 Ch. 622.
(*l*) *Steward* v. *Lombe*, 1 B. & B. 506.

looked for in the nature of the arrangement itself, and not in the way in which that arrangement is acted upon with regard to possession being taken (*m*).

In order to take advantage of this rule the subsequent acts must be consistent with the deed itself, and [* 124] not with a parol *agreement between the parties, for that is in the nature of a secret trust and is always viewed with the greatest suspicion (*n*).

Possession given or not, in accordance with the deed, will not of itself make it valid.

This being the reason of the rule, it follows, of course, that the mere fact of the possession, or the absence of it, when in accordance with the deed, will not set up the deed if there are other circumstances from which a fraudulent intention may be collected (*o*); nor, on the other hand, is the fact that no possession has been given conclusive proof of fraud, although inconsistent with the deed (*p*).

So a conveyance (by a debtor who remained in possession) absolute in form, but with a proviso that on payment on a future day the conveyance should be void and the property should revest in the grantor, was held to stand on the same footing as if such proviso had not been in the deed. The deed was held fraudulent because of other circumstances which afforded conclusive evidence of fraud (*q*). So the mere fact that a conditional sale, such as a mortgage, contained no proviso enabling the mortgagor to retain possession, is not conclusive evidence of fraud (*r*).

In *Cook* v. *Walker* (*s*) a bill of sale by way of mortgage of all the furniture and effects in an hotel was given by an hotel-keeper to a creditor to secure certain

(*m*) *Reeves* v. *Capper*, 5 Bing. N. C. 140; *Woodcrman* v. *Baldock*, 8 Taunt. 676; *Carr* v. *Burdiss*, 5 Tyrw. 309; *Reed* v. *Wilmot*, 5 Moo. & P. 583; *Weaver* v. *Joule*, 3 C. B. (N.S.) 309; *Haselinton* v. *Gill*, 3 T. R. 620–1, per Ashurst, J.; *Martindale* v. *Booth*, 3 B. & Ad. 498; *Alton* v. *Harrison*, L. R. 4 Ch. 622; *Eastwood* v. *Brown*, Ry. & M. 312.

(*n*) See the fifth badge of fraud in *Twyne's Case*, 3 Co. 81 a; *Edwards* v. *Harben*, 2 T. R. 587; 3 Bac. Abr. 7th ed. 785, pl. 2, tit. Fraud (C.); ante, p. 117; *Ex parte Chaplin*, 26 Ch. D. 319.

(*o*) *Riches* v. *Evans*, 9 C. & P. 640–642; *Crampthorne* v. ——, 6 L. J. Ch. 91.

(*p*) *Eastwood* v. *Brown*, Ry. & Mood. 312; *Jarman* v. *Woolloton*, 3 T. R. 620.

(*q*) *Crampthorne* v. ——, 6 L. J. Ch. 91.

(*r*) *Steward* v. *Lombe*, 1 B. & B. 506.

(*s*) 3 W. R. 357.

furniture and a sum of £70 advanced by her. The deed was an assignment of the whole furniture and effects on trust for sale, and, after payment of the £70 and agreed value of the furniture, the surplus was to be paid to the debtor.

The assignor not being insolvent at the time, the bill of sale was held valid against creditors, although the debtor remained in possession. Lord Hatherly (then Sir W. P. Wood, V.C.) said: "The bill of sale does not contain the usual clause of possession until default, but I think that cannot, in this Court, be much relied on where it is a mortgage security" (*t*).

* Here it will be seen the remaining in pos- [* 125] session was not inconsistent with the deed, which was in the form of a mortgage, but necessary for the purposes of the business, and the consideration for it was partly an existing debt and partly the price of furniture then sold. And in *Weaver* v. *Joule*, (*u*), where likewise a bill of sale was given by way of mortgage of chattels, and the consideration for it was partly an old debt, and partly a fresh advance, it was held that the fact of the assignor retaining possession (there being no evidence of fraud) was immaterial. But in that case there *was* a clause for possession until default.

The same principles apply to cases in which a debtor (*v*) or his representative (*w*) has given a preference to one creditor; for, notwithstanding what was said by Lord Kenyon in *Holbird* v. *Anderson* (*x*), want of possession being given under an assignment to defeat a particular execution or sequestration (*y*) is not always a proof of fraud. It is a fact which requires explanation, and from which, if not explained, a jury may be led to infer that the instrument was not meant to operate (*z*).

Upon this principle, that the possession is consistent with the deed, or with the object of the parties to it, an assignment by a man to trustees of the furniture in the house in which he and his wife and family live, has been held

(*t*) *Cook* v. *Walker*, 3 W. R. 357.
(*u*) 3 C. B. (N.S.) 309; and see *Ex parte Games* 12 Ch. D. 314.
(*v*) *Ex parte Games*, 12 Ch. D. 314.
(*w*) *Middleton* v. *Pollock*, 2 Ch. D. 104.
(*x*) 5 T. R. 235; ante, pp. 99 et seq.
(*y*) *Alton* v. *Harrison*, L. R. 4 Ch. 622.
(*z*) *Eveleigh* v. *Pursford*, 2 Mood. & Rob. 539.

not to be within 13 Eliz. c. 5, for they can only enjoy the furniture by its being in the house in which they all live (*a*). So, too, if trustees for creditors are by their deed of trust authorized to permit the debtor to use any part of the trust property till the debts are collected, such possession by the debtor is not fraudulent, because it is the object of the parties as expressed in the deed (*b*).

If trustees for creditors are authorized by the trust deed to permit the debtor to use any part of the trust [* 126] property till the * debts are got in, or for any other purpose, such possession is not fraudulent, because it is consistent with the deed (*c*).

The question of fraud or no fraud upon the ground of the want of possession is, then, in all these cases a question of fact for a judge or jury; and each particular case must be decided upon its special circumstances (*d*).

Notoriety of transfer lessens the presumption of fraud.

Notoriety of change of ownership acts as a powerful antidote to evidence of fraud as inferred from possession not being given to the assignee. Change of actual possession is notice to the world that there has been a change of ownership, and it is the same whether such notice is given in that way or by notoriety (*e*). In either way the presumption of ownership is rebutted.

In *Armstrong* v. *Baldock*, (*f*) a debtor assigned to trustees for the benefit of his creditors certain property and his implements and stock-in-trade, but, consistently with the deed, remained in possession. The question was, whether this assignment was good against a subsequent execution. Dallas, C.J., said that in all such cases as this notoriety of the change of possession is the question on which the validity or invalidity of

(*a*) *Cadogan* v. *Kennett*, Cowp. 432; *Arundell* v. *Phipps*, 10 Ves. 139; but see *Ashton* v. *Blackshaw*, L. R. 9 Eq. 510; post, pp. 135 et seq.

(*b*) *Kidd* v. *Rawlinson*, 2 B. & B. 59; *Reed* v. *Blades*, 5 Taunt. 212; *Boldero* v. *London and Westminster Discount Co.*, 5 Ex. D. 47.

(*c*) *Wooderman* v. *Baldock*, 8 Taunt. 676; *Goss* v. *Nealc*, 5 Moo. 191; *Neate* v. *Latimer*, 2 Y. & C. Ex. Ca. 257; *Burling* v. *Paterson*, 9 C. & P. 570; *Fenn* v. *Bittleston*, 7 Exch. 152; *Boldero* v. *London and Westminster Loan and Discount Co.*, 5 Ex. D. 47.

(*d*) *Martindale* v. *Booth*, 3 B. & Ad. 498; *Riches* v. *Evans*, 9 C. & P. 640; and see pp. 121, 122.

(*e*) *Latimer* v. *Batson*, 4 B. & C. 652; *Kidd* v. *Rawlinson*, 2 B. & P. 59; *Hoffman* v. *Pitt*, 5 Esp. 22; *Reed* v. *Blades*, 5 Taunt. 212; *Macdona* v. *Swiney*, 8 Ir. C. L. R. 73.

(*f*) Gow. 33.

the assignment depends; and the jury finding that there was not a notoriety of change of possession, a verdict was given against the validity of the assignment. And in a case (*g*) in the following year the same judge is reported to have said that where there are two requisites, a notorious change of possession which operates as notice to all the world, and a lawful consideration, the idea of fraud is excluded.

Secrecy.

As publicity goes toward lessening the degree of fraud inferred from want of possession, so secrecy in the transaction * increases it. Lord Coke's ad- [* 127] vice in *Twyne's Case* (*h*), as to gifts in satisfaction of a debt made by one who is indebted to others also, is: "Let it be made in a public manner, before the neighbours, and not in private, for secrecy is a mark of fraud. Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt. Immediately after the gift take possession of them; for continuance of the possession of the donor is a sign of trust" (*i*).

Possession only valuable as evidence of the *reality* of the transfer.

It has been shewn that in all cases turning on the want of possession the material question is, whether the conveyance was intended to operate as a *real* transfer of the property, or whether it was merely colourable, and meant as a cloak to defraud creditors; and that the absence of a delivery of possession is only of use as evidence of the intention to defraud.

Nature of possession must be such as to shew honesty.

Mere formal possession no use.

The *nature* of the possession which will be required to prevent any inference of fraud must be such as will shew the honesty of the intention to part with the property, and to act up to the terms of the agreement; so that a mere formal delivery, unless the transmutation of possession is notorious (*k*), will be of no use whatever (*l*).

(*g*) *Woodham* v. *Baldock*, Gow. 35, in note to *Armstrong* v. *Baldock*; but see S. C. 3 J. B. Moo. 11.

(*h*) 3 Co. 81 a; Lofft. 782–83; 3 Com. Dig. 297; *Stone* v. *Grubham*, 2 Bulst. 225; *Kidd* v. *Rawlinson*, 2 B. & P. 61; *Latimer* v. *Batson*, 4 B. & C. 652.

(*i*) *In re Johnson*, 20 Ch. D. 389, S. C. 51 L. J. (N. S.) Ch. 503; *Ex parte Wilson*, 22 W. R. 241. *Ex parte Chaplin*, 26 Ch. D. 319; and see 41 & 42 Vict. c. 31, and 45 & 46 Vict. c. 43, post, pp. 150 et seq.

(*k*) *Carr* v. *Burdiss*, 5 Tyrw. 309, 316; and per Dallas, C.J., in *Armstrong* v. *Baldock*, Gow, 34.

(*l*) Formal possession was given in *Edwards* v. *Harben*, 2 T. R. 587, ante, p. 119. See also 41 & 42 Vict. c. 31, and 45 & 46 Vict. c. 43, post, p. 151.

The delivery of possession and the giving up of ownership must be such as to exclude the doctrine of reputed ownership (*m*); it must be actual and complete.

In *Wordall* v. *Smith* (*n*) a publican made a bill of sale of his household furniture and stock-in-trade, and a servant of the assignee was immediately put into the house, but the publican and his wife continued to carry on the trade as usual for several weeks, during which time the servant employed to keep possession, when he sold beer, put the money into the till, to which the pub- [* 128] lican * and his wife had access. Lord Ellenborough said that to defeat the execution by a bill of sale there must appear to have been a bonâ fide substantial change of possession. It is a mere mockery to put in another person to take possession jointly with the former owner of the goods. A concurrent possession with the assignor is colourable. There must be an *exclusive* possession under the assignment, or it is fraudulent and void as against creditors. Lord Kenyon also took the same view in a very similar case (*o*).

Ex Parte Wilson.

In *Ex parte Wilson* (*p*) an unregistered bill of sale was given by A. to B., kept secret, and not acted on. The goods were afterwards sold to C., and the proceeds of sale were paid to B. It was held that although A. was insolvent at the time he gave the bill of sale, and bankrupt shortly afterwards, the payment to B. was valid. In that case it was said by James, L. J.: "I think the principle of *Twyne's Case* as to non-delivery of possession is to be applied in much the same way as the rule in bankruptcy with respect to *order and disposition;* which is, that the goods must remain in the order and disposition of the bankrupt up to the time of the bankruptcy, and when possession is given before the bankruptcy there is no ground for saying it is fraudulent." That doctrine merely applies the common principle that people must make good their representations; they must make good that which they hold out to the world as being the fact (*q*).

By the Bankruptcy Act, 1883 (*r*), the same principle

(*m*) *Carr* v. *Burdiss*, 5 Tyrw. 309. (*n*) 1 Camp. 332.
(*o*) *Paget* v. *Perchard*, 1 Esp. 205. (*p*) 22 W. R. 241.
(*q*) *Ex parte Hayman*, 8 Ch. D., per James, L.J., at p. 23; *Ex parte Wingfield*, 10 Ch. D. 591.
(*r*) Section 44 (3); see Robson, Bkcy. 5th ed. 533–562; post, p. 135.

is in the following terms re-enacted:—The property of the bankrupt shall comprise "all goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof."

Reputed ownership under Bankruptcy Act, 1883.

By the Married Women's Property Act, 1882 (*s*), it is provided that nothing in the Act shall give validity as against creditors of the husband to any gift by him to his wife of any * property which after such [* 129] gift shall continue to be in his order and disposition or in his reputed ownership.

The doctrine of reputed ownership does not apply in cases where the possession is quite consistent with the real title (*t*). Where a husband and wife remain in joint possession of furniture settled by the husband by a post-nuptial deed upon trust for his wife as her separate property and registered as a bill of sale, it will not, although post-nuptial, if for value, be void as against his creditors, because the subsequent possession is consistent with the deed (*u*).

It has been held under the reputed ownership clause of the Bankruptcy Act, 1869 (*v*), that goods were only in the possession, order, or disposition of a bankrupt in cases where the bankrupt was in the *sole* possession of the goods and as the *sole* reputed owner (*w*); and that the Act did not extend to cases in which the bankrupt and others were jointly in possession and were jointly reputed owners.

Reputed ownership applies only when bankrupt is in *sole* possession and as *sole* reputed owner.

In *Ex parte Watkins* (*x*) it was said by Lord Selborne, L.C., that to bring a case within the clause two things were necessary. "First, that there should be what is called the order and disposition of the property; and, secondly, that there should be, in point of fact, reputed ownership, arising from the circumstances." The question of reputed ownership is a question of fact, and not of law, and is to be determined from a consid-

(*s*) Section 10.
(*t*) *Ashton* v. *Blackshaw*, L. R. 9 Eq. 515–16
(*u*) *Ex parte Cox*, 1 Ch. D. 302.
(*v*) Section 15 (5); re-enacted by the Act of 1883; supra.
(*w*) *Ex parte Dorman*, L. R. 8 Ch. 51.
(*x*) L. R. 8 Ch. at p. 528.

eration of all the facts which any one who took pains to inform himself on the subject would know.

Possession given need only be that necessary for objects of deed.

But, on the other hand, where the purport of the deed is not of itself fraudulent, and the objects of it can be carried into effect without a thorough change of possession, the possession need only be such as is sufficient for effecting these objects (*y*). The possession need not always be either absolute or exclusive; for possession taken jointly with the vendor or settlor must be judged of by the other circumstances, and it will sometimes be a question for a jury whether the possession taken was sufficient.

Benton v. *Thornhill.*

[* 130] *In *Benton* v. *Thornhill* (*z*) a creditor sent his son B. to his debtor, and by his means obtained a bill of sale of all the debtor's effects, expressed to be in consideration of £600 (the amount of the debt). B. remained in the debtor's house, employed labourers to harvest and thrash out the crops, agents to sell the corn, and supplied the articles requisite for the maintenance of the family. On the other hand, the debtor himself paid and appealed against rates, sold a cow and corn to creditors, and wrought with the team for them, and was credited with the value in account; and also paid bills and servants, and gave orders respecting the farming business and stock on the farm, and sowed his land with wheat, and fed the horses with oats, both thrashed out by his orders from the crops included in the bill of sale. The debtor still appeared to act as owner and master, the servants on the farm not being aware that B. had taken possession, for he gave them orders in the name of the debtor. It was left to the jury to say whether this was an honest bill of sale, and they were told that that depended on what was the object of it, and whether a bonâ fide possession had been given under it; that there was an uncontroverted debt due, for which a bill of sale was given, which, if followed by possession, was certainly valid. The jury having found for the validity of the bill of sale, it was held that the verdict could not be set aside and a new trial granted on the ground that there had not been such an absolute delivery of possession as was necessary to make the bill of sale

(*y*) *Jezeph* v. *Ingram*, 8 Taunt. 838. See, also, ante, p. 115, cases in note (*t*).
(*z*) 2 Mars. 427, S. C. 7 Taunt. 149.

valid within the doctrine of *Twyne's Case* (*a*) and *Edwards* v. *Harden* (*b*).

In order to reconcile this decision with the cases of *Paget* v. *Perchard* (*c*) and *Wordall* v. *Smith* (*g*), previously mentioned (*e*), it may be noticed that here the bill of sale did not include the debtor's farm itself, of which he was lessee, so that some of his acts of ownership might be referred to that interest which he still retained, and also that here, it seems, there was a substantial change of possession, and that as between the debtor and creditor the property assigned seems to have been treated as belonging to *the creditor (*f*). [* 131] But in *Wordall* v. *Smith* (*g*), which was cited in *Benton* v. *Thornhill* (*h*), the money received after the alleged possession taken was put into the till, and the debtor had access to it; and in *Paget* v. *Perchard* (*i*) the debtor continued to receive the money taken in her trade, and *did not account for it.* Cases, how reconciled.

And it is clear that Lord Ellenborough in *Wordall* v. *Smith* did not lay down (*g*) a general principle applicable to all this class of cases, but that he must be taken to have spoken with regard to the particular circumstances of the case he had before him. This appears from the case of *Latimer* v. *Batson* (*l*), which, however, was on a somewhat different question. There the goods had been actually sold by the sheriff under a fi. fa., and the purchaser, though he put a servant in possession, allowed the debtor to remain in possession also, and to use the goods as if there had been no execution. Lord Tenderden (then Sir Charles Abbott, C.J.) said that the facts were very different from those in *Wordall* v. *Smith* (*g*), where Lord Ellenborough's observations, if construed with reference to that case, did not warrant the assertion that any distinct question should have been left to the jury as to the possession of the goods. In that case an as- Joint possession question for jury.

(*a*) 3 Rep. 80 b.
(*b*) 2 T. R. 587, and ante. p. 119; and see *Reed* v. *Blades*, 5 Taunt. 212.
(*c*) 1 Esp. 205.
(*e*) Ante, pp. 128, 129.
(*f*) See *Carr* v. *Burdiss*, 5 Tyrw. 309, 314.
(*g*) 1 Camp. 332.
(*h*) 2 Mars. 427.
(*i*) 1 Esp. 332.
(*l*) 4 B. & C. 652.

signment was made to a creditor without any execution, or any notice to the world that the assignor was a failing man. The goods assigned were the furniture and stock-in-trade of a public-house, where the business continued after the assignment to be carried on in the same manner as before. Here the assignment was made under the authority of the sheriff after he had entered to execute a writ of fi. fa., and a purchaser from the assignee had suffered the debtor to continue to use them (*n*).

Money paid a better consideration than a debt due.

In *Latimer* v. *Batson* the consideration was money paid at the time—less open to suspicion than that of an antecedent debt (*o*) : indeed, it is hard to see how [*132] such a conveyance could be presumed *fraudulent against creditors from want of possession unless there was actual fraud (*p*). "If," said Lord Eldon, in *Kidd* v. *Rawlinson*, "Kidd had lent money to Aburn to buy these goods, and had then taken a conveyance of them, or a security for his debt thus arising out of the mere act of lending the money ; leaving Aburn in possession of the goods would not have been a fraudulent act" (*q*). In such a case the other creditors are in no way injured by the transaction : if the money had not been lent, the goods could not have been purchased.

Money lent to buy goods.

Goods sold by sheriff and afterwards in debtor's possession.

When goods belonging to a debtor have once been sold under an execution or other process, their having got back into or being left in the possession of the debtor will be less liable to the imputation of fraud than where the sale is by the debtor himself (*r*) ; but even in such a case it is a question for a jury whether the transaction was fair or fraudulent, whether it was a bonâ fide sale, and the money really paid by the purchaser, or whether it was in fact paid by the debtor, and a colourable transaction (*s*).

(*n*) See next page.

(*o*) *Kidd* v. *Rawlinson*, 2 B. & P. 59; *Jezeph* v. *Ingram*, 8 Taunt. 838 ; *Martindale* v. *Booth*, 3 B. & Ad. 498 ; *Meggot* v. *Mills*, 1 Raym. 286 ; *Eastwood* v. *Brown*, Ry. & Mood. 312. See also B. N. P. 258 ; *Mercer* v. *Peterson*, L. R. 2 Ex. 304, S. C. L. R. 3 Ex. 104 ; *Plumb* v. *Flintt*, 2 Anstr. 439, 440 ; and *Agra Bank* v. *Barry*, L. R. 7 H. L. 135.

(*p*) *Macdona* v. *Swiney*, 8 Ir. C. L. 88.

(*q*) B. N. P. 258.

(*r*) See *Cole* v. *Davies*, 1 Ld. Raym. 724 ; *Latimer* v. *Batson*, 4 B. & C. 652.

(*s*) *Latimer* v. *Batson*, 4 B. & C. 652-3.

Thus in *Kidd* v. *Rawlinson* (*t*), an execution having issued against the goods of one Aburn, his furniture was taken and put up for sale by the sheriff. The plaintiff, Aburn's brother-in law, but not a creditor, became the purchaser, and a bill of sale was made out to him. The plaintiff allowed Aburn to keep possession, so as to be able to carry on his business; but he afterwards, being arrested for debt, made a bill of sale to the defendant, who took possession, and sold, after having received a notice from the plaintiff of his prior title. On an action by the plaintiff for money had and received by the defendant, the jury found that there was no fraud, but that it was intended that the bill of sale should be a security for the money advanced to the sheriff; and the plaintiff got a verdict. Lord Eldon pointed out the difference between this case and that of a sale by the debtor himself in satisfaction of the debt of one creditor, and said that this case did not fall within the principle of *Twyne's Case* (*u*); the goods were *purchased at a public sale by a [*133] person who had never acquired the character of a creditor, and were then lent to the original owner for a temporary and honest purpose. *Kidd* v. *Rawlinson.*

Jezeph v. *Ingram*, (*v*) was neither a mere sale by the debtor himself without possession, as in *Edwards* v. *Harben* (*w*), nor an absolute public sale by the sheriff, as in *Kidd* v. *Rawlinson* (*t*). The sheriff being in possession of the property in dispute, Dunk, another creditor, in order to liberate the goods, advanced money for that purpose, and took an assignment of the farm, stock, goods, &c., from the debtor as security, after which (in accordance with the terms of the assignment) Dunk entered and managed the farm, but the debtor continued in possession. The jury found that there was a want of sufficient notoriety of transfer, and gave their verdict for the plaintiff, a creditor who had subsequently obtained a judgment. Gibbs, C.J., granted a new trial. He said (*y*): "This is not the case of a dry sale and leaving the party in possession; on the other hand, it is not an absolute public sale by the sheriff, but money is paid him to redeem the goods, and then there is a conveyance from the debtor to the Another creditor satisfying execution and leaving the debtor in possession.

(*t*) 2 B. & P. 59.
(*u*) 3 Co. 80 b; et ante, p. 86.
(*v*) 8 Taunt. 838.
(*w*) 2 T. R. 587.
(*y*) 8 Taunt. 843.

person who advances the money." The jury on the new trial found in favour of the validity of the assignment.

Sale by sheriff and debtor remaining in possession as tenant of the purchaser.

It is a much stronger case where the purchaser from the sheriff has left the original owner in possession or at an actual rent, and it seems that such a possession is not of itself even evidence of fraud, and in the absence of proof of *actual* fraud will be upheld without a jury (*z*); and the circumstance of the purchaser being a creditor makes no difference if the creditor takes a a regular bill of sale from the sheriff; nor does it alter the case that the creditor so buying is also the execution creditor at whose suit the execution under which he bought was sued out, although he got that execution by means of a judgment confessed (*z*)

Other sales the sames, if notorious.

By auction.

The same principle applies to any case in which the sale is notorious (*a*). In *Leonard* v. *Baker* (*b*) a man made an assignment of his effects to trustees for his cred-
[*134] itors and absconded, the * assignment was advertised in the public papers, and then the goods sold by public auction to the plaintiff, who removed some of them, but left the greater part in the house in the possession of his mother, the wife of the debtor. It was held that this assignment was valid against a subsequent execution, the jury finding that the sale was notorious, and not made with an intent to defeat creditors. And so also where the sale is by the debtor's landlord under a distress for rent, which, if bonâ fide, is valid against creditors, and, unless collusion is alleged, without any question for a jury (*c*.)

By landlord under distress for rent.

(*z*) *Watkins* v. *Birch*, 4 Taunt. 823.
(*a*) *Latimer* v. *Batson*, 4 B. & C. 652.
(*b*) 1 Man. & S. 251.
(*c*) *Guthrie* v. *Wood*, 1 Stark. 367.

*CHAPTER VII. [*135]

BILLS OF SALE ACTS, 1878 AND 1882.

Secret transfers of *personal* property.

THERE were many cases of *secret* transfers of *personal* property which could not be impeached by creditors, either as fraudulent or as made without consideration, and in which, nevertheless, creditors might incur loss by placing reliance upon the fact of the debtor's appearing to continue in possession of the personal property after it had been secretly transferred.

How far prevented by Bankruptcy Acts.

This defect in the law has been remedied, if the debtor became insolvent or bankrupt, by certain provisions of successive Bankruptcy Acts which are known as the order and disposition clauses, or as the doctrine of reputed ownership (*d*), under which all "goods and chattels," under the Bankruptcy Act of 1869 (*e*), or all "goods," under the Act of 1883 (*f*), pass to the debtor's trustee in bankruptcy. But the doctrine of reputed ownership applies only under the Bankruptcy Act, 1869, if the bankrupt be a *trader* within the meaning of that Act (*g*), and under the Bankruptcy Act, 1883, only if the "goods" are in the possession, order, or disposition of the bankrupt *in his trade or business* (*h*); so that a large number of cases are still outside the scope of these sections.

In all the cases in which the debtor did not become insolvent or bankrupt, and where his continuance in possession after an assignment *for value*, because consistent with the terms of the deed, was not evidence of an intention to defraud creditors within the meaning of 13 Eliz. c. 5, the mere fact that the transfer was abso-

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(*d*) First introduced in 21 Jac. 1, c. 19, s. 11; before the Act of 1861, this doctrine applied to *all* bankrupts; and see notes to *Horn* v. *Baker*, Sm. L. C. 8th ed. vol. 2, pp. 245 et seq.; Robson, Bkcy. 5th ed. 529 et seq.

(*e*) 32 & 33 Viet. c. 71, s. 15 (5).

(*f*) 46 & 47 Vict. c. 52, s. 44 (2) (3).

(*g*) 32 & 33 Vict. c. 71, s. 15 (5), and schedule 1.

(*h*) *In re Wallis*, 14 Q. B. D. 950 *Rolls* v. *Miller*, 27 Ch. D. 71; *In re Jenkinson*, 15 Q. B. D. 441; Robson, Bkcy. 5th ed. 531–533.

lutely *secret* did not in general of itself invalidate the deed (*i*).

Act 1854. [*136] *The Bills of Sale Registration Act, 1854 (*k*), was the first of several Acts passed to give greater protection to creditors against *secret* bills of sale, and to enable them to ascertain whether the person in apparent possession of *personal* property was or was not the real owner, and, as such, entitled to credit on account of that personal property. The Act was not passed to make good a title which would not have been good before, but simply for the protection of creditors (*l*).

Under it bills of sale of personal chattels must have been registered within twenty-one days after their execution, in order to make them valid as against assignees in bankruptcy and execution creditors (*m*), *if* the personal chattels comprised in them were left in the apparent possession of the assignor (*n*). By the Bills of Sale Act, 1866 (*o*), provision was made for the re-registration of bills of sale every five years.

Act 1878. By the Bills of Sale Act, 1878 (*p*), both these last Acts were repealed (*q*), except as regarded bills of sale executed before the commencement of the Act on January 1, 1879 (*r*), as to which the Acts were to continue in force; and except also as to a rule of construction prescribed by the Act of 1878, in respect of fixtures and growing crops if assigned apart from the land, and as to the re-registration of such bills of sale (*s*).

It is provided by the Bills of Sale Act, 1878 (*t*), that every bill of sale under it shall be duly attested, and

(*i*) See *Ex parte Sparrow*, 2 De G. M. & G. 907; per Lord Hatherly, then Sir W. P. Wood, V.C., in *Mather* v. *Fraser*, 2 K. & J. 558–9; ante, pp. 124–217.

(*k*) 17 & 18 Vict. c. 36, which came into operation on July 10, 1854.

(*l*) *Re Daniel, Ex parte Ashby*, 25 L. T. 188.

(*m*) 17 & 18 Vict. c. 36. The corresponding Irish Act was 17 & 18 Vict. c. 55.

(*n*) *Minister* v. *Price*, 1 F. & F. 686.

(*o*) 29 & 30 Vict. c. 96.

(*p*) See Appendix No. III. The corresponding Act for Ireland is 42 & 43 Vict. c. 50, and is almost identical.

(*q*) 41 & 42 Vict. c. 31, s. 23.

(*r*) 41 & 42 Vict. c. 31, s. 2.

(*s*) 41 & 42 Vict. c. 31, ss. 7, 23.

(*t*) 41 & 42 Vict. c. 31, s. 8.

shall be registered under that Act within *seven* days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given.

If these requisites, or any of them, are not complied with, the bill of sale is, after the expiration of the seven clear days (*v*), deemed fraudulent and void as against either the trustees in bankruptcy, or the assignees under assignments for the benefit of creditors, or the execution creditors, of the grantor; but in *re [* 137] spect only of all chattels in his possession, or apparent possession, at or after the times therein specified.

Act 1882 applies *only* to bills of sale by way security for payment of money.

The Bills of Sale Act, 1878, Amendment Act, 1882 (*w*), which came into operation on November 1, 1882, and which, so far as is consistent with the tenor thereof, is to be construed as one with the Act of 1878 (*x*), and in which the expression "*bill of sale*" and other expressions in it have the same meaning as in the Act of 1878, applies *only* to bills of sale given by way of security for the payment of money (*y*).

This Act, unless the context otherwise requires it, does not apply to any bill of sale duly registered before November 1, 1882, so long as the registration thereof is not avoided by non renewal or otherwise (*y*); nor does it apply to bills of sale executed, but not registered, before that date (*z*); nor to bills of sale duly registered under the Act of 1854, but not re-registered (*a*).

Object of Act 1882 to protect both borrower and lender.

The object of the Bills of Sale Act, 1882, said Brett, M.R., is twofold: first, that the borrower should understand the nature of the security which he was about to give for the debt due from him; and secondly, that a creditor, upon merely searching the register, should be able to understand the position of the borrower, and should not be compelled to go to a solicitor in order to get counsel's opinion as to the meaning of a security already created by the borrower (*b*).

(*v*) *Marples* v. *Hartley*, 1 B. & S. 1,
(*w*) 45 & 46 Vict. c. 43. See Appendix No. IV.
(*x*) Section 2.
(*y*) Section 3.
(*z*) Section 3; *Hickson* v. *Darlow*, 23 Ch. D. 690.
(*a*) *Swire* v. *Cookson*, 9 App. Cas. 653.
(*b*) *Davis* v. *Burton*, 11 Q. B. D. 539; *Melville* v. *Stringer*, 13 Q. B. D. 397; and see *In re Williams* 25 Ch. D. 663, 664.

How a bill of sale may be avoided.

If a bill of sale be really voluntary, although it may have complied with the technical requirements of the Bills of Sale Acts (*c*), it may be avoided either under 13 Eliz. c. 5, or as an act of bankruptcy; or, if for value, on proof of actual fraud.

A bill of sale may be fraudulent on any of the above grounds although it fulfils all the technical requirements of the Bills of Sale Acts. The mere fact of due registration under the Bills of Sale Acts does not necessarily make it good against creditors (*c*).

[* 138] * A bill of sale may also be deemed fraudulent, *by virtue* of the Bills of Sale Acts, because it fails to comply with them; although it is in fact bonâ fide and untainted by fraud.

It is from this point of view they are here considered.

Three classes of bills of sale.

The result of the Act of 1882 and that of 1878 seems to be to divide bills of sale into the following three classes:—

1. Bills of sale executed on or after November 1, 1882, to secure the payment of money; which are subject to the provisions of the *two* Acts of 1878 and 1882 (*d*).

2. Bills of sale, executed before November 1, 1882, whether absolute or to secure the payment of money.

3. Absolute bills of sale executed on or after November 1, 1882 (*e*).

Both these two last classes are subject *only* to the provisions of the Act of 1878, unless it is in the Act of 1882 otherwise specifically enacted (*f*).

Requirements of Bills of Sale Act, 1878, Amendment Act, 1882.

Every bill of sale under the Act of 1882 is void unless made in accordance with the form in the schedule annexed to the Act (*g*).

(*c*) See *Mercer* v. *Peterson*. L. R. 2 Ex. 304, S. C. L. R. 3 Ex.; *Oriental Banking Co.* v. *Coleman*, 3 Giff. 11; and see *Darville* v. *Terry*, 6 H. & N. per Martin, B., 812; post, p. 141.

(*d*) *Swift* v. *Pannell*, 24 Ch. D. 210; *Casson* v. *Churchley*, 53 L. J. (N.S.) Q. B. 335.

(*e*) *Robinson* v. *Tucker*, 1 C. & E. 173; *Swift* v. *Pannell*, 24 Ch. D. 210; *Casson* v. *Churchley*, 53 L. J. (N.S.) Q. B. 335.

(*f*) 45 & 46 Vict. c. 43, s. 13.

(*g*) 45 & 46 Vict. c. 43, s. 9.

Such bill of sale must be made or given in consideration of a sum not under £30 (*h*).

It must also be duly attested and registered under the Act of 1878 within *seven* clear days after the execution thereof, and shall truly set forth the consideration for which it was given; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein (*i*).

There have been many conflicting decisions on the point when a bill of sale under the Act of 1882 is made in accordance with the form in the schedule annexed to the Act.

Ex parte Stanford.

In the recent case of *Ex parte Stanford* (*k*), decided by the full Court of Appeal, a bill of sale whereby the grantor, as security * for money, "*as beneficial owner*" assigned chattels to the grantee was held void because, by virtue of section 7 of the Conveyancing Act, 1881, a covenent thereby introduced altered the legal rights of the parties from those given by section 13 of the Bills of Sale Act of 1882. [* 139]

Test whether a bill of sale is in accordance with form in schedule.

The true principle was there laid down to be this: a bill of sale is in accordance with the prescribed form if it is substantially in accordance with it, if it does not depart from the prescribed form in any material respect.

The bill of sale may diverge substantially from that form in either of the two following ways; and in such case is void.

It may thereby have a legal consequence or effect either greater or smaller than that which would attach to it in the prescribed form. It may also thereby depart from that form in a manner calculated to mislead the borrower.

Whatever form the bill of sale takes, the form adopted by it, in order to be valid, must produce not merely the like effect, but the same effect—that is to say, the legal effect, the whole legal effect, and nothing but the legal

(*h*) 45 & 46 Vict. c. 43, s. 12; see *Davis* v. *Usher*, 12 Q. B. D. 490.
(*i*) 45 & 46 Vict. c. 43, s. 8.
(*k*) 17 Q. B. D. 259; at pp. 270, 271.

effect, which it would produce if cast in the exact mould of the schedule.

In the cases cited below (*l*) one or more of the variations have been held to substantially alter the legal effect of the bill of sale from the form in the schedule so as to avoid it. But, in the cases cited below (*m*), the variations in the bill of sale from the form in the schedule have been deemed so slight in their legal effect that it has been upheld.

Bill of sale under Act 1882 if void is so against *all* persons.

[* 140] * Every bill of sale by way of security for the payment of money is, if made after November 1, 1882 (*n*), absolutely *void* against the whole world, even as against the grantor, if it is not in accordance with the provisions of the Act of 1882 (*o*).

And every covenant and provision in it is void if not in accordance with form in schedule.

If a bill of sale is rendered void because not made in accordance with the form in the schedule to the Act of 1882 (*p*), then every provision and covenant contained therein is also rendered void. The document cannot be bad as a bill of sale and yet be valid as a covenant to secure the payment of principal and interest by the grantor. The *whole* document is, in fact, absolutely nugatory (*q*).

(*l*) *In re Williams*, 25 Ch. D. 656; *Davis* v. *Burton*, 10 Q. B. D, 414, S. C. 11 Q. B. D. 537; *Melville* v. *Stringer*, 13 Q. B. D. 392; *Hetherington* v. *Groome*, 13 Q. B. D. 789; *Levy* v. *Polack*, 52 L. T. (N.S.) 532; *Crosser & Long* v. *Maxwell*, W. N. (1885), 95; *Sibley* v. *Higgs*, 15 Q. B. D. 619; *Myers* v. *Elliott*, 16 Q. B. D. 526; *Ex parte Parsons*, 16 Q. B. D. 532; *Clemson* v. *Townsend*, 1 C. & E. 418; *Lee* v. *Barnes*, 17 Q. B. D. 77; *Goldstrom* v. *Tallerman*, 17 Q. B. D. 80; *Blaiberg* v. *Parsons*, 17 Q. B. D. 337; *Davies* v. *Rees*, 17 Q. B. D. 408; *Farber* v. *Cobb*, 17 Q. B. D. 459; *Bianchi* v. *Offord*, 17 Q. B. D. 484; *Mackay* v. *Meredith*, 34 W. R. 433, *The Liverpool Crmmercial Co.* v. *Richardson*, 55 L. J. (N.S.) Q. B. at p. 455.

(*m*) *Wilson* v. *Kirkwood*, 48 L. T. (N.S.) 821; *In re Cunningham*, 28 Ch. D. 682, *Hammond* v. *Hocking*; 12 Q. B. D. 291; *Roberts* v. *Roberts*, 13 Q. B. D., 794; *Farber* v. *Abrey*, 1 C. & E. 186; *Thorp* v. *Creegen*, 55 L. J. (N.S.) Q. B. 80; *Ex parte Allam*, 14 Q. B. D. 43; *In re Hall*, 14 Q. B. D. 386; *The Consolidated Credit and Mortgage Corporation, Limited*, v. *Gosney*, 16 Q. B. D. 24 *Hughes* v. *Little*, 17 Q. B. D. 204; *Ex parte Bentley*, 34 W. R. 579; *In re Cleaver*, 55 L. J., (N.S.) Q. B. 455; *Lumley* v. *Simmons*, 55 L. J. (N.S.) Q. B. 579.

(*n*) Ante, p. 138.

(*o*) 45 & 46 Vict. c. 43, ss. 7, 8, 9, 12; see *Davis* v. *Burton*, 11 Q. B. D., per Brett, L.J., 539, 540; *Ex parte Parsons*, 16 Q. B. D., per Lindley, L.J., 546; *Ex parte Stanford*, 17 Q. B. D., per Fry, L.J., 274; *Davies* v. *Rees*, 17 Q. B. D. 408; *Blaiberg* v. *Parsons*, 17 Q. B. D. 337.

(*p*) Section 9.

(*q*) *Davies* v. *Rees*; 17 Q. B. D. 408.

Is a deed with attornment clause *thereby* avoided in toto under Act 1882?

It is conceived that a mortgage may now, by reason merely of containing an *attornment clause* or a power of distress, become totally void under the Bills of Sale Act, 1882 (*r*), if, by reason only of containing such clause or power, it requires registration under that Act as a bill of sale within the meaning of the Act of 1878 (*s*). The mortgage cannot be made in the form prescribed in the schedule to the Act of 1882, and therefore it would appear to be absolutely void (*t*).

There has been no express decision, however, that a mortgage deed which contains an attornment clause or power of distress *therefore* requires registration as a bill of sale within the meaning of the Bills of Sale Act, 1878 (*u*). It may perhaps be held that, even if this be so decided, if the true intention of the mortgage deed is not to create a bill of sale, the whole deed will not be avoided simply because, *quâ* a particular clause in it not being a part of its real purport and intention, the mortgage deed required registration. The relation created by an attornment clause is only * creat- [* 141] ed as subsidiary to the mortgage, and is to operate as an additional and better security to the mortgagee (*v*). On this ground, such a deed may possibly be distinguished from one of which the *sole* object is to secure the payment of money lent on the security of personal chattels.

Consideration under Bills of Sale Acts.

Before the Act of 1878 it was not necessary to state the consideration in a bill of sale.

But under the Act of 1878 a bill of sale is deemed "fraudulent and void" (*w*) and under that of 1882 "void" (*x*) if it does not set forth the consideration for which it was given.

Inasmuch as under the Act of 1878 the consideration

(*r*) 45 & 46 Vict. c. 43, s. 9.
(*s*) 45 & 46 Vict. c. 43, s. 3; 41 & 42 Vict. c. 31, ss. 4, 6.
(*t*) *Ex parte Parsons*, 16 Q. B. D. 532; *Davies* v. *Rees*, 17 Q. B. D. 408; *Blaiberg* v. *Parsons*, 17 Q. B. D. 337.
(*u*) See *Ex parte Williams*, 7 Ch. D. 138; *Ex parte Jackson*, 14 Ch. D. 725; *Ex parte Voisey*, 21 Ch. D. 442; Dav. Prec. Conv. 4th ed. vol. 2, pt. 2, 98, 99.
(*v*) *In re Stockton Iron Furnace Co.*, 10 Ch. D. 356, 357; *Ex parte Punnett*, 16 Ch. D., per Jessel, M.R., 235, and Lush, L.J., 236.
(*w*) 41 & 42 Vict. c. 31, s. 8.
(*x*) 45 & 46 Vict. c. 43, s. 8.

must be stated (*y*), while under the Act of 1882 it must be "truly stated" (*z*), the decisions under the Act of 1878 on the question what is a sufficient statement of the consideration will apply to cases under the Act of 1882 (*a*).

Must it be valuable?

Neither in the Act of 1878 nor in that of 1882 is it expressly required that the consideration to be stated should be a valuable one. There appears to be no decision upon the point whether, under either Act, the statement of a good or merely a meritorious consideration would suffice to uphold a bill of sale otherwise valid. It is conceived that a bill of sale in which the consideration is "stated," or "truly stated," would not be avoided, under either Act, merely because it was *not* a valuable one.

The question under these Acts is merely whether the real consideration has been set out. The nature of the consideration is not material for the purposes of those Acts.

What is consideration?

The word "consideration" is a legal term, and it means that which in point of law is the consideration for the giving of the instrument (*b*). It means everything, no more and no less, than the grantor gets for [* 142] the bill of sale (*c*), but not at all necessarily *the amount named by the bill of sale, which may be much more or less than the consideration (*d*).

What consideration must be stated.

It has been held that the consideration which must be set forth is that which the grantor actually receives from the grantee for giving the bill of sale, the real, the actual consideration; probably it need not be stated with minute accuracy, but it must be set forth substantially (*e*).

It is sufficient if the facts are accurately stated either

(*y*) 41 & 42 Vict. c. 31, s. 8.
(*z*) 45 & 46 Vict. c. 43, s. 8.
(*a*) Post, pp. 142 et seq.
(*b*) *Ex parte Challinor*, 16 Ch. D. 265, per James, L.J.; *Ex parte Winter*, 29 W. R. 575.
(*c*) *Ex parte Charing Cross Advance Bank*, 16 Ch. D. 35.
(*d*) *Ex parte Challinor*, 16 Ch. D. 268, per James, L.J.
(*e*) *Ex parte National Mercantile Bank*, 15 Ch. D. 53, per James, L.J.; *Roberts* v. *Roberts*, 13 Q. B. D. 802, per Brett, M.R.; *Ex-parte Winter*, 29 W. R. 575; *Ex parte Beetenson*, 42 L. T. (N.S.) 808.

as to their legal effect or as to their mercantile and business effect, although they may not be stated with strict accuracy (*f*). The real consideration as between the grantor and grantee, the consideration which should have been properly stated in the deed if the Act had not been passed, is the consideration which must be stated (*g*).

What is proper statement of *amount*.

There is one class of cases in which the real question is, what is a proper statement of the *amount* of the consideration?

The fact that part of the money was paid to other persons with the grantor's assent does not render the statement of the consideration inaccurate (*h*).

So, a statement of the consideration as "£2050 by the mortgagees paid to the mortgagor," which was handed over the counter to the mortgagor, of which £550 was at once handed back to the mortgagees to meet bills payable by the mortgagor to the mortgagees, but not *then due*, was upheld (*i*); and also where the consideration was stated to be £560, of which sum £60 was really retained for the costs of the valuers and the solicitor's costs both of preparing the bill of sale and of other matters (*k*).

But the amount has been held untruly stated where it was * expressed to be "£120 by the mort- [* 143] gagee paid to the mortgagor at or before the execution hereof," while in fact only £90 was advanced, £30 being deducted by the grantee for interest and expenses (*l*). This case was distinguished from *Ex parte National Mercantile Bank* (*m*) on the ground that in that case the retainer was to meet a debt existing *independent* of the bill of sale, while in this case the liability arose solely out of it.

(*f*) *Credit Co.* v. *Pott*, 6 Q. B. D. 299, per Brett, L.J.
(*g*) *Credit Co.* v. *Pott*, 6 Q. B. D. 297, per Selborne, L.C.; *Ex parte Johnson*, 26 Ch. D. 348, per Bowen, L.J.
(*h*) *Hamlyn* v. *Betteley*, 5 C. P. D. 327.
(*i*) *Ex parte National Mercantile Bank*, 15 Ch. D. 55; *Credit Co.* v. *Pott*, 6 Q. B. D. 295.
(*k*) *Ex parte Challinor*, 16 Ch. D. 260; followed in *Ex parte Bolland*, 21 Ch. D. 543.
(*l*) *Ex parte Charing Cross Advance Bank*, 16 Ch. D. 35; *Ex parte Firth*, 19 Ch. D. at p. 430.
(*m*) 15 Ch. D. 42.

Test whether proper *amount* is stated.

In *Ex parte Rolph* (*n*) and *Ex parte Firth* (*o*) these cases were all reviewed and reconciled in the Court of Appeal by the application of the following principle, laid down by James, L.J., in *Ex parte Challinor* (*p*), and quoted with approval by Cotton, L.J., in *Ex parte Bolland* (*q*). Whether the whole of the mortgage money secured by a bill of sale is actually paid by the lender into the hands of the borrower, or whether part of it is with his privity or by his direction employed in the payment of a debt due by him, it is equally in a legal sense paid to him, and the whole sum may in either case be truly stated in the deed as the consideration paid to the grantor. But the money retained or applied must be in respect of a debt strictly so called, a debt *existing at the time*, independent of any created by the bill of sale (*r*).

So, where the consideration was stated to be "£700 now in hand paid," while £7 10*s*. was retained by the grantee for commission on the loan and expenses in connection therewith, it was held untruly stated (*s*).

In *Ex parte Rolph* (*t*) the consideration was expressed to be "£50 by the assignee paid to the assignor at or before the execution hereof." In fact, only £21 10*s*. was paid to the assignor on the execution of the deed, and £25 was retained and paid by the assignee a week later to the assignor's landlord for the rent of the house in which the chattels were for the two quarters, of which the first was not due for *two* days, in accordance with a written request of the assignor dated the [* 144] day of the execution of the deed. *The Court of Appeal held the consideration to be untruly stated, because the £25 was not paid at all at the execution of the deed, and was not paid to the assignor at all, but only on his behalf. In *Ex parte Firth* (*o*), the consideration was expressed to be "the sum of £40 now lent and paid by the mortgagee to the mortgagor," while in fact only £38 10*s*. was then paid, £1 10*s*. being retained by the grantees for the cost of the bill of sale given by

(*n*) 19 Ch. D. 98.
(*o*) 19 Ch. D. 419.
(*p*) 16 Ch. D. 260.
(*q*) 21 Ch. D. at p. 552.
(*r*) *Ex parte Firth*, 19 Ch. D. 429, per Jessel, M. R.; and see *Ex parte Bolland*, 21 Ch. D. per Cotton, L.J., 552.
(*s*) *Hamilton* v. *Chaine*, 7 Q. B. D. 1, 319; and see *Ex parte Carter*, 12 Ch. D. 908.
(*t*) 19 Ch. D. 98; see *Collis* v. *Tuson*, 46 L. T. (N.S.) 387.

way of mortgage. It was held by the Court of Appeal that, as there was no debt until *after* the transaction was completed, the consideration was untruly stated.

But in the case of *In re Cann* (*v*), however, a bill of sale was given "in consideration of £10 now paid by H. to C." In fact, D. acted as solicitor in the matter for both H. and C., and, on the execution of the deed, received the £10 from H., and, with C.'s consent, retained £9 for costs and handed over £1 to C. Cave, J., held that, under the circumstances, the consideration was stated with perfect accuracy, for on the execution of the deed D. ceased to be H.'s agent, and was C.'s agent alone, and, as such, could apply the £9 to pay his costs.

In *Ex parte Bolland* (*w*) the consideration was stated to be "£2000 to the mortgagor paid by the mortgagee immediately before the execution of these presents," while the grantor owed the grantee £2000, the balance of £2500 purchase-money for a leasehold brewery, and had paid him £500 in cash and given him the bill of sale for the balance, and this was accepted by the grantee in payment. The Court of Appeal held the consideration to be truly stated, following *Ex parte Challinor* (*x*), as it would be held in law a payment of the £2000.

Cases as to circumstances of advance.

There is another class of cases in which the question is whether the circumstances attending the advance have been so mis-stated as to amount to an untrue statement of the consideration.

It is a matter of some difficulty to say in what cases precisely, and upon what principle, the Court would hold the mis-statement of the transaction so [* 145] mixed up with the consideration as to give an untrue impression of what the consideration really was (*y*).

Recitals of the motive and object of the advance need not be stated, nor need any collateral agreement or bargain between the grantor and the grantee as to the application of the consideration (*z*); nor need the history of the transaction be described (*a*).

(*v*) 13 Q. B. D. 36; and see *In re Williams*, 25 Ch. D. 656,
(*w*) 21 Ch. D. 543. (*x*) 16 Ch. D. 260.
(*y*) *Hamlyn* v. *Betteley*, 5 C. P. D., per Grove J., 330.
(*z*) *Ex parte National Mercantile Bank*, 15 Ch. D., per James, L. J., 53; *Ex parte Popplewell*, 21 Ch. D. 73; *Ex parte Winter*, 29 W. R. 575.
(*a*) *Ex parte Allam*, 14 Q. B. D. 43.

Of course, if there was a bargain that the whole sum which is stated to be the consideration should be at once returned to the grantee, that would be a sham transaction (*b*).

The consideration of a bill of sale which contained a recital in which promissory notes were mis described as bills of exchange which had been discounted, and in which an agreement to take up the bills was described as a covenant hereinafter contained, and was actually omitted, was held to be sufficiently stated (*c*).

A verbal agreement not to register a bill of sale, being a mere collateral agreement, is no part of the consideration (*d*). So, a recital that a bill of sale was executed to induce the grantee not to take proceedings, against the grantor was held immaterial (*e*). So, the mis-statement of the consideration in the deed cannot be corrected by a true statement of it in the indorsed receipt, which is not part of the deed (*f*).

As payment does not necessarily mean payment at once, a statement of the consideration as the payment of two sums in fact paid some two months before was held sufficient (*g*). So, where there was an agreement that the grantor should have a present advance of £1500, and should give a bill of sale as security for it, which was done, and that bill, being found to be worthless, was replaced by a bill in which the consideration was stated as money "now paid," the consideration was held to be properly described (*h*).

[* 146] *Where a sum of £400 was advanced by five instalments, the first three of which, amounting to £240, were advanced to the grantor and his partner some time before June, while £100 was advanced in June and £60 in July, both to the grantor alone, and the deed recited that £340 was advanced to the grantor in June all at

(*b*) *Ex parte National Mercantile Bank*, 15 Ch. D., per James L. J., 53.
(*c*) *Roberts* v. *Roberts*, 13 Q. B. D. 794.
(*d*) *Ex parte Popplewell*, 21 Ch. D. 73.
(*e*) *Ex parte Winter*, 29 W. R. 575.
(*f*) *Ex parte Charing Cross Advance Bank*, 16 Ch. D. 34.
(*g*) *Carrard* v. *Meek*, 50 L. J. (N.S.) C. P. 187; but see *Ex parte Rolph*, 19 Ch. D. 98.
(*h*) *Ex parte Allam*, 14 Q. B. D. 43; but see *Ex parte Berwick*, 29 W. R. 292.

one time, it was held that the consideration was not truly stated (*i*).

Act 1882 applies whether right to immediate possession of goods is given to grantee or not.

It has been a question whether the Bills of Sale Act, 1882, applied to cases in which the right to immediate possession of the goods was given by the grantor to the grantee, and the grantee took possession of the goods instantly in accordance with the contract then and there made (*k*)

The Court of Appeal, however, in *Ex parte Parsons* (*l*), where the bill of sale conferred a right to immediate possession of the goods, laid down the principle that the Act of 1882 applies, whether the right to immediate possession is or is not given by the grantor to the grantee. The ground of this decision is that (unless the document is one of the excepted class of documents specified in section 4 of the Act of 1878) section 9 of the Act of 1882 avoids *every* document by which goods are made a security for a debt, unless it is made in accordance with the form prescribed in the schedule.

But not when *possession* is at once transferred by the transaction.

But a transaction (such as a pledge) the effect of which is immediately to transfer possession as distinguished from giving the right to take it is not within the scope of the Bills of Sale Acts. The distinction seems to be that in such a case the transfer of possession precedes the document, instead of following it; and that the special property passes by that transfer of possession, and not *by* the document (*m*).

What is a bill of sale depends on Act 1878.

The question whether a particular document, if a security for the payment of money, is within the Act of 1882 depends upon whether it is a bill of sale as define by the Act of 1878 (*n*). If the document is a bill of sale as defined by the Act 1878, then it is a bill of sale within the Act of 1882.

*By the Bills of Sale Act, 1878 (*o*), the expres- [*147]

(*i*) *Ex parte Carter*, 12 Ch. D. 908; but see *Ex parte National Mercantile Bank*, 15 Ch. D. 55; *Credit Co.* v. *Pott*, 6 Q. B. D. 295.

(*k*) See *In re Hall*, 14 Q. B. D. 386; *In re Cunningham*, 28 Ch. D. 682; but see post, p. 150.

(*l*) 16 Q. B. D. 532.

(*m*) *In re Hall*, 14 Q. B. D. 386; *In re Hardwick*, 55 L. J. (N.S.) Q. B. 490.

(*n*) 41 & 42 Vict. c. 31 ss. 4, 6, 10 (3); 45 & 46 Vict. c. 43, s. 3.

(*o*) Section 4.

What is a bill of sale under Act 1878.

sion "bills of sale" includes "bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred."

What is a bill of sale.

The following documents have been held to be "bills of sale":—

An agreement to execute a bill of sale, if relied on as an equitable assignment, but not if a mere agreement (*p*); a receipt for purchase-money (*q*); a document giving licence to take immediate possession (*r*); a post-nuptial settlement (*s*), but not if made in pursuance of an ante-nuptial agreement (*t*).

Every attornment, instrument, or agreement (not being a mining lease) whereby a power of distress is given by way of security for any debt or advance, and whereby any rent is reserved for the purpose of such security only, is deemed a bill of sale (*u*).

And any defeasance, condition, or declaration subject to which the bill of sale is given, and which is not contained in the body thereof, shall be deemed to be a part of the bill, and shall be written on the same parchment or paper thereof (*v*).

A parol agreement to pay a debt by instalments is a defeasance (*w*); but a memorandum was held not to be a condition so as to require registration (*x*), nor is a verbal agreement not to register a bill of sale (*y*).

(*p*) *Ex parte Mackay*, L. R. 7 Ch. 643; *Ex parte Conning*, L. R. 16 Eq. 414; *Edwards* v. *Edwards*, 2 Ch. D. 291.
(*q*) *Snell* v. *Heighton*, 1 C. & E. 95.
(*r*) *Reg.* v. *Townshend*, 15 Cox, C. C. 466; *In re Cunningham & Co.*, 28 Ch. D. 682; and see *In re Hardwick*, 55 L. J. (N.S.) Q. B. 490.
(*s*) *Ashton* v. *Blackshaw*, L. R. 9 Eq. 510.
(*t*) *Fowler* v. *Foster*, 28 L. J. Q. B. 210.
(*u*) Section 6; ante, p. 140. (*v*) Section 10 (3).
(*w*) *Ex parte Southam*, L. R. 17 Ed. 578; and see *Ex parte Odell*, 10 Ch. D. 76.
(*x*) *Ex parte Collins*, L. R. 10 Ch. 367.
(*y*) *Ex parte Popplewell*, 21 Ch. D. 73.

*A bill of sale given by the equitable owner [*148] will be valid if registered in his name (*y*).

A bill of sale originally duly registered, even if assigned by the grantee, will be void if not re-registered (*z*.)

But the expression "bill of sale" does not include the following documents :— What is *not* a bill of sale.

Assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented.

The following documents have been held not to be bills of sale :—

An equitable sub-mortgage of a registered bill of sale (*a*) ; a transfer so far only as relates to the sum transferred, where a further advance is then made (*b*) ; a contract giving a right connected with the vendor's lien on goods *in transitu* (*c*) ; an inventory of goods, with receipt for the purchase-money attached to it, when not the instrument of transfer, but merely an acknowledgement for money previously paid (*d*) ; a mere equitable agreement (*e*) ; a building agreement which is a licence to take possession of personal chattels, but

(*y*) *Walrond* v. *Goldmann*, 16 Q. B. D. 121, not following *Chapman* v. *Knight*, 5 C. P. D. 308.

(*z*) *Karet* v. *The Kosher Meat Supply Association, Limited*, 2 Q. B. D. 361 ; and see *Horne* v. *Hughes*, 6 Q. B. D. 676 ; *Ex parte Shaw*, 25 W. R. 686 ; *Askew* v. *Lewis*, 10 Q. B. D. 477.

(*a*) *Ex parte Turquand*, 14 Q. B. D. 636.

(*b*) *Horne* v. *Hughes*, 6 Q. B. D. 676 ; and see section 10 (5); and *Ex parte Shaw*, 25 W. R. 68.

(*c*) *Ex parte Watson*, 5 Ch. D. 35.

(*d*) *Woodgate* v. *Godfrey*, 4 Ex. D. 59, S. C. 5 Ex. D. 24 ; *Marsden* v. *Meadows*, 7 Q. B. D. 80 ; and see *Ex parte Odell*, 10 Ch. D. 76 ; *Ex parte Cooper*, 10 Ch. D. 313.

(*e*) *Ex parte Mackay*, L. R. 8 Ch. 653.

not as security for a debt (*f*), or which contains a clause that all building or other materials brought by the builder on the land shall become the property of the landowner (*g*); an agreement for the loan and hiring [*149] of furniture unaccompanied by any other *documents (*h*), a parol agreement to give a bill of sale (*i*); property bought by a wife after marriage in renewal or substitution for that included in the marriage settlement (*k*); an assignment for the benefit of *all* the creditors of the grantor (*l*); a valid hypothecation under the Factors Act (*m*); an assignment of a foreign ship (*n*); a charge on a share in a partnership by way of security (*o*).

A document which gives rights at law only and not in equity is not a bill of sale (*p*).

A bill of sale of goods in Scotland need not be registered in England (*q*); and it would appear that an Irish bill of sale of personal chattels partly situated in England and partly in Ireland only needs registration in Ireland (*r*).

What are personal chattels.

By the Bills of Sale Act, 1878, the expression "personal chattels" is defined to mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures (*s*) and growing crops (*t*).

(*f*) *Ex parte Newitt*, 16 Ch. D. 522.
(*g*) *Reeves* v. *Barlow*, 11 Q. B. D. 610, S. C. 12 Q. B. D. 436.
(*h*) *Ex parte Crawcour*, 9 Ch. D. 419; and see *North Central Wagon Co.* v. *Manchester, &c., Co.*, 32 Ch. D. 477.
(*i*) *Ex parte Hauxwell*, 23 Ch. D. 626.
(*k*) *Duncan* v. *Cashin*, L. R. 10 C. P. 554.
(*l*) *Reg.* v. *Creese*, L. R. 2 C. C. R. 105; *Johnson* v. *Oscenton*, L. R. 4 Ex. 107; *Ashford* v. *Tuite*, 7 Ir. C. L. Rep. 91; *Boldero* v. *London and Westminster Discount Co.*, 5 Ex. D. 47.
(*m*) *Ex parte North-Western Bank*, L. R. 15 Eq. 69; and see *Merchant Banking Co.* v. *Spoffen*, Ir. L. R. 11 Eq. 586; *In re Hall*, 14 Q. B. D. 386.
(*n*) *Union Bank* v. *Lenanton*, 3 C. P. D. 243; *Ex parte Hodgkin*, L. R. 20 Eq. 746.
(*o*) *Ex parte Fletcher*, 8 Ch. D. 218.
(*p*) *Reeves* v. *Barlow*, 11 Q. B. D. 610, S. C. 12 Q. B. D. 436; *In re Hardwick*, 55 L. J. (N.S.) Q. B., per Bowen, L.J., at p. 493.
(*q*) *Coots* v. *Jecks*, L. R. 13 Eq. 597.
(*r*) *Brookes* v. *Harrison*, 6 L. R. Ir. 332; see section 24.
(*s*) As to what are fixtures, see notes to *Elwes* v. *Mawle*, 2 Sm. L. C. 8th ed. 169 et seq.; and section 7; and *Ex parte Moore and Robinson's Banking Co.*, 14 Ch. D. 379; *The Sheffield and South Yorkshire Permanent Building Society* v. *Harrison*, 54 L. J. (N.S.) Q. B. 15.
(*t*) Section 4; as to growing crops, see further section 7.

Trade machinery, whether separately assigned or charged, or not, is, for the purposes of this Act, deemed "personal chattels" (*t*).

What are not personal chattels.

But the expression "personal chattels" does not include chattel interests in real estate, nor fixtures (*u*) when assigned together *with* a freehold or leasehold interest in any land or building to which they are affixed; nor growing crops (*v*) when assigned together *with* any interest in the land on which they grow; nor *shares or interests in the stock, funds, or secu- [* 150] rities of any Government, or in the capital or property of incorporated or joint-stock companies, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement, or of the custom of the country, ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale.

It has been held that an assignment of growing crops under the repealed Act of 1854 did not require registration, as there could be no present delivery of growing crops (*w*); but so soon as they are severed they become personal chattels under the Act of 1887. An assignment of future growing crops passes the property in them on their coming into existence (*x*).

Apparent possession.

Under the Bills of Sale Act, 1878, a bill of sale was in certain events, but only against certain defined persons, avoided (*y*), *if* the personal chattels comprised in it were, at the time specified in section 8, "in the possession or apparent possession" of the grantor (*z*).

That "apparent possession" was also defined by the same Act (*a*).

A bill of sale in which the sale or mortgage of the personal chattels comprised in it is followed by a complete transfer and delivery of them to the grantee, either at once or within the period of seven days al-

(*t*) Section 5.
(*u*) See section 5; and Act 1882, s. 6.
(*v*) See section 7; and Act 1882, s. 6.
(*w*) *Brantom* v. *Phillips*, 2 C. P. D. 212; *Ex parte Payne*, 11 Ch. D. 539; *Ex parte National Mercantile Bank*, 16 Ch. D. 104.
(*x*) *Clements* v. *Matthews*, 11 Q. B. D. 808.
(*y*) *Davis* v. *Goodman*, 5 C. P. D. 128; *Lyon* v. *Tucker*, 6 Q. B. D. 660, S. C. (reversed on another point) 7 Q. B. D. 523.
(*z*) Section 8. (*a*) Section 4.

lowed for registration, is not within this Act (*b*). The title of the grantee is in such a case as good as if the deed had been duly registered within the time(*c*).

The doctrine of "apparent possession" was aimed at the practice of giving symbolical possession under a bill of sale by handing over a chair or something of that sort in the name of the whole of the goods, or putting a person on the premises as one of the bankrupt's family, leaving the grantor as much the apparent owner of the goods as he was before the execution of the bill of sale (*d*).

[* 151] * The real question seems to be this in each case, Is the grantor having the goods kept for him, and does he still exercise dominion over them? (*e*)

It is immaterial for this purpose *how* the grantee under an unregistered bill of sale has acquired possession of the goods so as to exclude the apparent possession of the grantor. It is enough that he has done so effectually (*f*).

When apparent possession exists.

It is a difficult question to decide what the nature of the possession must be so as to exclude the operation of the Act. This is a question of fact.

It must, under the Act, be something more than a merely formal possession. It must be such a visible possession in the view of the outer world that any one would infer the ownership had changed (*g*).

So, the goods have been held in the apparent possession of the grantor when the grantee of furniture in a house occupied by the grantor put a person in possession of them in that house, but the grantee up to the time of his bankruptcy lived in the house and used the furniture (*h*); or when the grantee put a man in pos-

(*b*) *Chapman* v. *Knight*, 5 C. P. D., per Grove, J., 314, 315; *Ex parte Close*, 14 Q. B. D., per Cave, J., 393; *In re Cunningham*, 28 Ch. D., per Pearson, J., 687.

(*c*) *Ex parte Saffery*, 16 Ch. D. 668.

(*d*) *Ex parte Saffery*, 16 Ch. D., per Lush, L.J., 671.

(*e*) *Ancona* v. *Rogers*, 1 Ex. D. at p. 292.

(*f*) *Ex parte Symmons*, 14 Ch. D. 693.

(*g*) *Ex parte Lewis*, L. R. 6 Ch. 626; *Ex parte Jay*, L. R. 9 Ch. 697; *Seal* v. *Claridge*, 7 Q. B. D. 516.

(*h*) *Ex parte Hooman*, L. R. 10 Eq. 63; and see *Ashton* v. *Blackshaw*, L. R. 9 Eq. 520; *Ex parte Homan*, L. R. 12 Eq. 598; *Ex parte Harding*, L. R. 15 Eq. 223.

session of the goods in a house belonging to the grantor, in which the grantor did not sleep, but of which he had a key, and went in and out as he chose (*i*); or when the grantee was entitled to, and unsuccessfully endeavored to obtain possession of, the goods (*k*); or when the grantor had bailed the goods with a bailee to keep for him (*l*).

What is occupation.

The *occupation* of the premises by the grantor must be an actual *de facto* occupation; the mere continuance of his tenancy is not enough (*m*); but if he does occupy them, the fact that he did so as servant to the grantee, and having the benefit of the furniture as part of his salary, is immaterial (*n*).

When apparent possession is excluded.

* Actual visible possession by the grantee [* 152] or by some other person for him, if such a possession that every one exercising ordinary vigilance can see it, will take the personal chattels out of the apparent possession of the grantor (*o*).

So the possession of a receiver (*p*), of a sheriff under an execution issued either by the grantee or a third party (*q*), an advertisement of the goods for sale under a bill of sale after the grantee has taken possession of them, though still in the house of the grantor (*r*), a wrongful possession, but only as to goods of which actual physical possession is taken (*s*), or when the debtor had the use of the goods subject to the control of the man put into possession by the grantee (*t*), have been held to exclude the apparent possession of the grantor.

(*i*) *Seal* v. *Claridge*, 7 Q. B. D. 516.
(*k*) *Ancona* v. *Rogers*, 1 Ex. D. 285; *Ex parte Jay*, L. R. 9 Ch. per Mellish, L. J., 705.
(*l*) *Ancona* v. *Rogers* 1 Ex. D. 285.
(*m*) *Robinson* v. *Briggs*, L. R. 6 Ex. 1.
(*n*) *Pickard* v. *Marriage*, 1 Ex. D. 364; and see *Ex parte Morrison*, 28 W. R. 524; *Gibbons* v. *Hickson*, 55 L. J. (N.S.) Ch. 119.
(*o*) *Ex parte Saffery*, 16 Ch. D., per Lush, L.J., 671; and see *Lincoln Wagon Co.* v. *Mumford*, 41 L. T. (N.S.) 655.
(*p*) *Taylor* v. *Eckersley*, 5 Ch. D. 740.
(*q*) *Ex parte Saffery*, 16 Ch. D. 668; but see *Ex parte Mutton*, L, R. 14 Eq. 175.
(*r*) *Gough* v. *Everard*, 2 H. & C. 1; *Ex parte Lewis*, L. R. 6 Ch. 626; *Emanuel* v. *Bridger*, L. R. 9 Q. B. 286; *Smith* v. *Wall*, 18 L. T. 182.
(*s*) *Ex parte Fletcher*, 5 Ch. D. 809; but see *Tucker* v. *Finlayson*, 24 W. R. 570.
(*t*) *Ex parte National Guardian Assurance Co.*, 10 Ch. D. 408.

So, if the grantee openly, really and truly takes possession, although the grantor remains in possession, the Act does not apply (*u*).

It is not necessary that the posession of the grantee should be *exclusive* to take the goods out of the grantor's apparent possession (*v*).

Apparent possession not under Act 1882.

The words "apparent possession" are not in the Act of 1882; it would therefore seem that this question cannot occur in any bill of sale by way of security for the payment of money made after October 31, 1882 (*w*), which if not registered within seven clear days after the execution thereof is void (*x*).

Reputed ownership not under Act 1878,

Under the Bills of Sale Act, 1878 (*y*), chattels comprised in a registered bill of sale, if given by way of absolute transfer, whether registered before November [* 153] 1882 or not (*z*), or if given merely * by way of security for the payment of money, and duly registered before November 1, 1882, are not in the order and disposition of the grantor within the bankruptcy law. The owner of chattels by virtue of such a registered bill of sale is expressly protected by that Act from the operation of the doctrine of reputed ownership. During the seven days allowed by that act for registration, this doctrine does not apply (*a*).

but under Act 1882.

But, chattels comprised in a bill of sale given by way of security for the payment of money, and duly registered on or after November 1, 1882 (*b*), are in the order and disposition of the grantor within the bankruptcy law. So far as that Act applies, registration of a bill of sale does not affect the doctrine of reputed ownership so as to take the chattels comprised in it out of the order and disposition of the grantor (*c*).

The chattels comprised in an unregistered or not val-

(*u*) *Davies* v. *Jones*, 10 W. R. 779.
(*v*) Act 1882, s. 2; ante, p. 151.
(*w*) Act 1882, s. 8.
(*x*) *Davies* v. *Jones*, 10 W. R. 779; and see *Ex parte Mortlock*, W. N. (1881) 161.
(*y*) 41 & 42 Vict. c. 31, s. 20; *Ex parte Izard*, 23 Ch. D. 409.
(*z*) *Swift* v. *Pannell*, 24 Ch. D. 210.
(*a*) *In re Hewer*, 21 Ch. D. 871.
(*b*) 45 & 46 Vict. c. 43, ss. 3, 15; *Swift* v. *Pannell*, 24 Ch. D. 210.
(*c*) As to what is reputed ownership, see ante, pp. 128, 129, 135; Robson, Bkcy. 5th ed. 529 et seq.

idly registered bill of sale, whenever executed, and whether by way of absolute transfer or not, if in the apparent possession of the grantor, are of course unprotected by the Bills of Sale Act, 1878, and therefore are subject to this clause of the Bankruptcy Acts (*d*).

How far execution avoids bill of sale.

Under the repealed Act of 1854 the effect of an execution was to entirely avoid a prior unregistered bill of sale (*e*). Under the Bills of Sale Act, 1878, however, an unregistered bill of sale is void only so far as is necessary to satisfy the claim of the execution creditor (*f*); but this applies even if the execution creditor had notice of the bill of sale when he became the grantor's creditor (*g*).

Registration under Act 1878.

By the Bills of Sale Act, 1878 (*h*), a bill of sale must be registered within seven clear (*i*) days after it is made or given; and the bankruptcy of the grantor within those seven days is immaterial if the bill of sale is registered in due time (*k*).

If a bill of sale is void because not re-registered at the *commencement of this Act, it cannot be [* 154] renewed under it; and the same will apply to an assignment of it (*l*).

Under Act 1882.

By the Bills of Sale Act, 1882 (*h*), a bill of sale must be duly registered, under the Act of 1878, within seven clear days after its execution.

This Act has been held not to apply to an unregistered bill of sale executed more than seven clear days before the date of its operation (*n*).

Successive bills of sale.

Under the repealed Act of 1854 there was a practice, by agreement between grantor and grantee, to give and accept successive bills of sale, each executed within

(*d*) *Ashton* v. *Blackshaw*, L. R. 9 Eq. 510; *Ex parte Harding*, L. R. 15 Eq. 228.

(*e*) *Richards* v. *James*, L. R. 2 Q. B. 285; but see *In re Artistic Colour Printing Co.*, 21 Ch. D. 510.

(*f*) *Ex parte Blaiberg*, 23 Ch. D. 254.

(*g*) *Edwards* v. *Edwards*, 2 Ch. D. 291; as to Act 1882, ante, pp. 138, 140.

(*h*) Section 8.

(*i*) Section 10 (2).

(*k*) *Ex parte Kahen*, 21 Ch. D. 871.

(*l*) *Askew* v. *Lewis*, 10 Q. B. D. 477; and see *Karet* v. *Kosher Meat Supply Association*, 2 Q. B. D. 361.

(*n*) *Hickson* v. *Darlow*, 23 Ch. D. 690.

twenty-one days after the one before, the last of the series only being registered; and this was upheld against execution creditors (*o*), but not against a trustee in bankruptcy (*p*), unless based upon a new consideration (*q*).

By the Bills of Sale Act of 1878 (*r*) successive bills of sale of the same personal chattels executed within, or on the expiration of, seven days after the execution of a prior unregistered bill of sale are made absolutely void, unless the last bill of sale is proved to have been made only to correct an error, not to evade the Act.

This does not apply to a parol agreement to give a bill of sale subsequently executed in accordance with the agreement (*s*); nor to a subsequent bill of sale executed *more* than seven days after the execution of a prior unregistered bill of sale of the same chattels (*t*).

Test of priority of bill of sale.

By the Bills of Sale Act, 1878 (*u*), it is provided that in case two or more bills of sale are given comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels.

This has been held to apply not only as between two [* 155] *registered* *bills of sale, but also as between a subsequently registered and a *prior* unregistered bill of sale (*v*); and whether the grantee under either bill of sale is or is not in possession of the goods (*w*).

The point has not been decided which of two bills of sale, each duly registered within the time prescribed by the Acts, has priority.

Registration of transfer of bill of sale.

Under the Bills of Sale Act, 1878, a transfer or assignment of a registered bill of sale need not be regis-

(*o*) *Stansfield* v. *Cubitt*, 2 D. G. & J. 222; *Hollingsworth* v. *White*, 10 W. R. 619; *Smale* v. *Burr*, L. R. 8 C. P. 64; *Ramsden* v. *Lupton*, L. R. 9 Q. B. 17.

(*p*) *Ex parte Cohen*, L. R. 7 Ch. 20; *Ex parte Stevens*, L. R. 20 Eq. 786; *Ex parte Furber*, 6 Ch. D. 181; *Ex parte Payne*, 11 Ch. D. 539.

(*q*) *In re Jackson*, 4 Ch. D. 682.

(*r*) Section 9.

(*s*) *Ex parte Hauxwell*, 23 Ch. D. 626.

(*t*) *Carrard* v. *Meek*, 50 L. J. (N.S.) C. P. 187.

(*u*) Section 10 (4).

(*v*) *Conelly* v. *Steer*, 7 Q. B. D. 520.

(*w*) *Lyons* v. *Tucker*, 6 Q. B. D. 660, S. C. 7 Q. B. D. 523.

tered (*x*); and a renewal of registration shall not become necessary by reason only of a transfer or assignment of a bill of sale (*y*). A sub-mortgage of a registered bill of sale by way of mortgage need not be registered (*z*).

It seems doubtful whether if, on the transfer, a fresh advance be made to the mortgagor by the transferee, such transfer will need registration as to the further advance (*a*); it will not need registration to the extent of the amount transferred (*b*). And the point has not been decided whether the transferee, either with or without the concurrence of the original grantor of an unregistered bill, can by registration protect himself (*c*).

A bill of sale registered after October 31, 1882, must also be renewed every five years in accordance with the Bills of Sale Act, 1878 (*d*).

Attestation of bill of sale under Act 1878.

A solicitor must attest the execution of every bill of sale under the Bills of Sale Act, 1878; and the attestation clause must state that the attesting solicitor explained the effect of the bill of sale to the grantor before the execution of it (*e*).

Any solicitor, whether in practice or not, or a mere clerk, and even if in any way connected with the grantee (*f*), and whether the solicitor of the grantee (*g*), or of both the grantor and grantee (*h*), may be the attesting witness; but the grantee himself may not * attest if a solicitor (*i*), neither, of course, can [* 156] the grantor if a solicitor.

If the attestation clause states that before the execution of the bill of sale the effect of it has been explain-

(*x*) Section 10 (5).
(*y*) Section 11.
(*z*) *Ex parte Turquand*, 14 Q. B. D. 636.
(*a*) *Horne* v. *Hughes*, 6 Q. B. D. 676; and see *Wale* v. *Commissioners of Inland Revenue*, 4 Ex. D. 270.
(*b*) Ibid.
(*c*) See *Chapman* v. *Knight*, 5 C. P. D. 308; *Carrard* v. *Meek*, 50 L. J. (N.S.) C. P. 187.
(*d*) See Act 1882, s. 3; *Swire* v. *Cookson*, 9 App. Cas. 653.
(*e*) Section 10 (1).
(*f*) *Hill* v. *Kirkwood*, 28 W. R. 358.
(*g*) *Penwarden* v. *Roberts*, 9 Q. B. D. 137.
(*h*) *Vernon* v. *Cooke*, 49 L. J. (N.S.) C. P. 767.
(*i*) *Seal* v. *Claridge*, 7 Q. B. D. 516.

ed by a solicitor, the Court will not inquire whether any explanation was in fact given, or what its nature was (*k*); and the bill of sale will be deemed valid even if the attesting solicitor omitted to give the explanation which the attestation clause states he has given (*k*), nor need that statement be verified by the affidavit of due execution and attestation directed to be filed by the Act (*l*).

Under Act 1882.

The Bills of Sale Act, 1882 (*m*), repeals these two requirements as to attestation, and provides that the execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses, not being a party or parties thereto.

This new provision will apply *only* to bills of sale by way of security for the payment of money made after October 31, 1882.

By the Bills of Sale Act, 1878 (*l*), the following documents must be presented to the registrar within seven clear days after the making of the bill of sale:—

1. The original bill, with every schedule or inventory thereto annexed or therein referred to.

2. A true copy (*o*) of such bill, and of every such schedule or inventory, and of every attestation of the execution of such bill of sale.

3. An affidavit of the time of such bill of sale being made, and of its due execution and attestation, and a description of the residence and occupation of the grantor, and a description of the residence and occupation of each attesting witness. Such copy and affidavit must be filed with the registrar within seven clear days after the making of the bill of sale.

Affidavit under Act 1878 and Act 1882.

The decisions as to the affidavit to be filed and as to [* 157] the * description of the grantor or attesting witness under the repealed Act of 1854 apply to this

(*k*) *Hill* v. *Kirkwood*, 28 W. R. 358; *Ex parte National Mercantile Bank*, 15 Ch. D. 42.
(*l*) Section 10 (2).
(*m*) Section 10; ante, p. 155, note (*e*).
(*o*) See *Gardnor* v. *Shaw*, 19 W. R. 753; *Lamb* v. *Brace*, 24 W. R. 645; *Re Hewer*, 21 Ch. D. 871.

section of the Bills of Sale Act, 1878, and also, it is conceived, to bills of sale under the Bills of Sale Act, 1882.

The affidavit must state as a fact the true date of execution of the bill of sale (*p*). But that date may be stated by reference (*q*).

It must state the due execution *and* attestation of the bill of sale. The affidavit must state that the attesting solicitor was present, and did witness its due execution (*r*).

It must describe the residence and occupation of the grantor *and* of each attesting witness (*s*).

This description must be that which applies at the time of swearing the affidavit, and not of executing the bill of sale (*t*).

A description to the best of the belief of the deponent has been held sufficient (*u*).

There is nothing in the Act to necessitate the grantor's name being correctly given, and, in the absence of fraud, an error in it is immaterial (*v*).

The description must be contained either somewhere in the affidavit, even in the introductory part of it (*w*), or in some document incorporated by reference into it (*x*), or by a reference in the affidavit to the bill of sale (*y*); or that in the affidavit may be explained or

(*p*) *Darvill* v. *Terry*, 6 H. & N. 807.
(*q*) *Lamb* v. *Bruce*, 45 L. J. (N.S.) Q. B. 538.
(*r*) *Sharpe* v. *Birch*, 8 Q. B. D. 111; *Ford* v. *Kettle*, 9 Q. B. D. 139; *Ex parte Knightley*, 30 W. R. 844; *Cooper* v. *Zeffert*, 32 W. R. 402; and see *Ex parte Carter*, 12 Ch. D. 908.
(*s*) *Pickard* v. *Marriage*, 1 Ex. D. 364; *Nicholson* v. *Cooper*, 27 L. J. (N.S.) Ex. 393.
(*t*) *Button* v. *O'Neill*, 4 C. P. D. 354, overruling *London and Westminster Loan Co.* v. *Chance*, 12 C. B. (N.S.) 730; *Ex parte Wolfe*, 44 L. T. (N.S.) 321, S. C. 45 L. T. (N.S.) 268; but see *In re Hewer*, 21 Ch. D. 871.
(*u*) *Roe* v. *Bradshaw*, L. R. 1 Ex. 106; and see *Yates* v. *Ashcroft*, 31 W. R. 156.
(*v*) *Ex parte M'Hattie*, 10 Ch. D. 398.
(*w*) *Blaiberg* v. *Parke*, 10 Q. B. D., per North, J., 94.
(*x*) Ibid.
(*y*) *Banbury* v. *White*, 2 H. & C. 300; *Routh* v. *Roublot*, 1 E & E. 850.

supplemented by the bill of sale (*z*). But a descrip-
[* 158] * tion in the bill of sale alone is insufficient (*a*), and a contradiction between the description in the affidavit and that in the bill of sale is fatal (*b*).

If there are several grantors, the description of each of them must be given, although only one is in possession of the goods (*c*). But the joinder in a bill of sale of a person who had no interest in the goods, and had nothing to convey, is mere surplusage, and therefore immaterial (*d*).

What is a sufficient description.

There have been many decisions upon the question what is a *sufficient* description of the residence of the grantor and of every attesting witness.

The principle by which the Court tests the sufficiency of the description is to strictly follow out the object of the Bills of Sale Acts. That was, and is, by means of registration, to give notice to all who are likely to deal with the grantor of the bill of sale; to enable any one who is asked to give him credit to know at once, by looking at the register, whether the person he is asked to give credit to has executed a bill of sale (*e*). So, with regard to each attesting witness, the object is to enable any person interested in making inquiries to find that attesting witness (*f*).

The test really is whether the description is enough to enable any actual or intending creditor, by the use of ordinary care, to identify his debtor, or an attesting witness, so as to be able to make any necessary inquiries of him (*g*). It need not afford the fullest means of knowledge (*h*). It is a question of circumstances in each particular case, and no more general rule can be laid down.

(*z*) *Jones* v. *Harris*, L. R. 7 Q. B. 157; *Thorp* v. *Brown*, L. R. 2 H. L., 220; *Ex parte Mackenzie*, 42 L. J. Bkcy. 25.
(*a*) *Hatton* v. *English*, 7 E. & B. 94.
(*b*) *Murray* v. *Mackenzie*, L. R. 10 C. P. 625; *Brodrick* v. *Scale*, L. R. 6 C. P. 98.
(*c*) *Hooper* v. *Parmenter*, 10 W. R. 648.
(*d*) *Ex parte Popplewell*, 21 Ch. D. 73.
(*e*) *Ex parte Hooman*, L. R. 10 Eq. 63; *Jones* v. *Harris*, L. R. 7 Q. B., per Cockburn, C.J., 160; *Larchin* v. *North-Western Deposit Bank*, L. R. 10 Ex. 64; *Murray* v. *Mackenzie*, L. R. 10 C. P. 625.
(*f*) *Lamb* v. *Bruce*, 45 L. J. (N.S.) Q. B. 538.
(*g*) Ibid.
(*h*) *Blount* v. *Harris*, 4 Q. B. D. 603.

The burden of proof lies on the person who challenges the accuracy of the description to shew it is not accurate (*i*).

An error in the description which is mere [159] surplusage (*k*), or which cannot mislead (*l*), will not avoid the registration; but it will if calculated to mislead (*m*), as where the wrong number of the house or street is given (*n*), or, of course, if absolutely incorrect (*o*).

Residence.

The residence which should be described is the place or places (*p*) in which the grantor or attesting witness carries on business or is occupied during the day, either for himself or for another—the place where he is most likely to be found (*q*). The residence of an incorporated company is its principal office (*r*).

In the cases cited below, the residence of the grantor or attesting witness has been held to be described sufficiently (*s*), or insufficiently (*t*).

Occupation.

The same test is applied to determine whether the occupation of the grantor and each attesting witness is sufficiently described. Occupation means the principal business of a man's life, vocation, calling, trade, the business which a man follows to procure a living or

(*i*) *Sutton* v. *Bath*, 3 H. & N. 382; *Grant* v. *Shaw*, L. R. 7 Q. B. 700; *Throssel* v. *Marsh*, 53 L. T. (N.S.) 321; but see *Castle* v. *Downton*, 5 C. P. D. 56.

(*k*) *Ex parte Popplewell*, 21 Ch. D. 73; *Ex parte Wolfe*, 44 L. T. (N.S.) 321 S. C. 45 L. T. (N.S.) 268.

(*l*) *Hewer* v. *Cox*, 3 E. & E. 428; *Blount* v. *Harris*, 4 Q. B. D. 603; *Ex parte M'Hattie*, 10 Ch. D. 398; *Corbett* v. *Rowe*, 25 W. R. 59; *Throssel* v. *Marsh*, 53 L. T. (N.S.) 321.

(*m*) *Castle* v. *Downton*, 5 C. P. D. 56.

(*n*) *Murray* v. *Mackenzie*, L. R. 10 C. P. 635.

(*o*) *Cooper* v. *Davis*, 31 W. R. 721, S. C. 32 W. R. 329.

(*p*) *Wallis* v. *Smith*, W. N. (1882) 77.

(*q*) *Attenborough* v. *Thompson*, 2 H. & N. 539; *Blackwell* v. *England*, 8 E. & B. 56; *Ex parte Brewell*, 29 W. R. 99; *Hewer* v. *Cox*, 3 E. & E. 428.

(*r*) *Maughan* v. *Sharpe*, 17 C. B. (N.S.) 443; *Shears* v. *Jacob*, L. R. 1 C. P. 523; *Deffell* v. *White*, L. R. 2 C. P. 144.

(*s*) *Hewer* v. *Cox*, 3 E. & E. 428; *Blackwell* v. *England*, 8 E. & B. 56; *Bellamy* v. *Saul*, 7 L. T. (N.S.) 345; *Cooper* v. *Ibberson*, 29 W. R. 566; *In re Moulson*, 51 L. J. (N.S.) Ch. 823; *Briggs* v. *Boss*, L. R. 3 Q. B. 268; *McCue* v. *James*, 19 W. R. 158; *Blount* v. *Harris*, 4 Q. B. D. 603; *Ex parte M'Hattie*, 10 Ch D. 398.

(*t*) *Jones* v. *Harris*, L. R. 7 Q. B. 157; *Re Harms*, 10 Ir. Ch. 100; *Murray* v. *Mackenzie*, L. R. 10 C. P. 625; ante, pp. 156 et seq.

obtain wealth (*u*), the business in which a man is usually engaged to the knowledge of his neighbours (*v*). The occupation described must be that (if any) at the time of swearing the affidavit (*w*). Probably, if the grantor or attesting witness has more than one occupation, he need only state that which is his substantive occupation (*x*).

[* 160] *In the cases cited below, the occupation of the grantor or of the attesting witness has been held described sufficiently (*y*), or insufficiently (*z*).

Although one witness is sufficient for the attestation of a bill of sale, yet, if several persons do attest, the description of the residence and occupation of each of them must be stated in the affidavit (*a*).

The affidavit to be made on the re-registration of a bill of sale must state the residence of the grantee as stated in the bill of sale, even if it was there erroneously stated (*b*).

A bill of sale under the Act of 1882 is valid although

(*u*) *Tuton* v. *Sanover*, 3 H. & N. 280.

(*v*) *Luckin* v. *Hamlyn*, 18 W. R. 43.

(*w*) Ante, p. 156; and see *Ex parte Chapman*, 45 L. T. (N.S.) 268; *Castle* v. *Downton*, 5 C. P. D. 56; *Cooper* v. *Davis*, 31 W. R. 721.

(*x*) See *Ex parte National Mercantile Bank*, 15 Ch. D. 57, per Bramwell, L.J.; and *Ex parte National Bank*, 26 W. R. 375, S. C., per Thesiger, L.J., 624.

(*y*) *McCue* v. *James*, 19 W. R. 158; *Smith* v. *Cheese*, 1 C. P. D. 60; *Gray* v. *Jones*, 14 C. B. (N.S.) 743; *Sutton* v. *Bath*, 3 H. & N. 382; *Morewood* v. *South Yorkshire Railway Co.*, 3 H. & N. 798; *Trousdale* v. *Sheppard*, 14 Ir. C. L. 370; *Ex parte Young*, 28 W. R. 924; *Luckin* v. *Hamlyn*, 21 L. T. (N.S.) 366; *Briggs* v. *Boss*, L. R. 3 Q. B. 268; *Lamb* v. *Bruce*, 45 L. J. (N.S.) Ex. 538; *Gugen* v. *Sampson*, 4 F. & F. 974; *Grant* v. *Shaw*, L. R. 7 Q. B. 700; *Foulger* v. *Taylor*, 1 L. T. (N.S.) 57; *Re Earl of Limerick*, 7 Ir. Jur. (N.S.) 65; *Gardner* v. *Smart*, 1 C. & E. 14; *Ex parte Wolfe*, 44 L. T. (N.S.) 321, S. C. 45 L. T. (N.S.) 268; *Ex parte Chapman*, 45 L. T. (N.S.) 268.

(*z*) *Dryden* v. *Hope*, 9 W. R. 18; *Brodrick* v. *Scale*, L. R. 6 C. P. 98; *Allen* v. *Thompson*, 1 H. & N. 15; *Adams* v. *Graham*, 9 L. T. (N.S.) 606; *Beales* v. *Tennant*, 29 L. J. (N.S.) Q. B. 188; *Crosbie* v. *Murphy*, 8 Ir. C. L. R. 301; *Re O'Connor*, 27 L. T. 27; *Re Doughty*, 2 Ir. R. Eq. 235; *Ex parte Hooman*, L. R. 10 Eq. 63; *Larchin* v. *North-Western Deposit Bank*, L. R. 10 Ex. 64; *Ex parte National Deposit Bank*, 26 W. R. 375, S. C. 26 W. R. 624; *Castle* v. *Downton*, 5 C. P. D. 56.

(*a*) *Pickard* v. *Marriage*, 1 Ex. D. 364; *Nicholson* v. *Cooper*, 27 L. J. (N.S.) Ex. 393.

(*b*) *Ex parte Webster*, 22 Ch. D. 136; Act 1878, s. 11; Act 1882, s. 11.

it contains no description of the place where the goods are. The Act does not require the place to be described in the bill of sale (*c*).

After-acquired property.

An assignment for value of *personal* chattels to be afterwards acquired constitutes only a contract in equity to assign them, and is absolutely inoperative at law. But so soon as the personal chattels have come into existence, if they are so specifically described as to be capable of being identified, the contract operates in equity as an assignment of which the Court will enforce specific performance (*d*).

Under Act 1878.

The real difficulty in such cases under the Bills of Sale Acts, 1854 and 1878, was to ascertain whether the subject-matter of the * assignment was definite [* 161] and specific, so that when at a future time the property assigned came into existence it was capable of being identified; or was indefinite and vague, and therefore the assignment was void because not capable of being specifically enforced in equity.

Thus, assignments of machinery, plant, and fixtures (*e*), of stock-in-trade which during the continuance of the security might be brought on the premises either in addition to or in substitution for that actually there at the date of the bill of sale (*f*), of future crops on a particular farm (*g*), of after-acquired personal chattels upon specified premises (*h*), of future book debts due and owing to the grantor (*i*), have been held to be sufficiently defined and valid in equity.

On the other hand, assignments of all the personal estate and effects hereafter to be in a certain farm or elsewhere in the United Kingdom (*k*), of all future personal property to secure any sum or sums in which the grantor might be indebted to the assignee at the time

(*c*) *Ex parte Hill*, 17 Q. B. D. 74.
(*d*) *Holroyd* v. *Marshall*, 10 H. L. C. 191; *Collyer* v. *Isaacs*, 19 Ch. D. 342; *Joseph* v. *Lyons*, 15 Q. B. D. 280.
(*e*) *Holroyd* v. *Marshall*, 10 H. L. C. 191; *Leatham* v. *Amor*, 47 L. J. (N.S.) Q. B. 581.
(*f*) *Lazarus* v. *Andrade*, 5 C. P. D. 318; *Collyer* v. *Isaacs*, 19 Ch. D. 342.
(*g*) *Clements* v. *Matthews*, 11 Q. B. D. 808.
(*h*) *Hallas v. Robinson*, 15 Q. B. D. 288.
(*i*) *The Official Receiver* v. *Tailby*, 17 Q. B. D. 88.
(*k*) *Belding* v. *Reed*, 3 H. & C. 955; and see *Brown* v. *Fryer*, 46 L. T. (N.S.) 637.

he might choose to make use of the assignment (*l*), and of all future crops to which the assignor might during the continuance of the security be entitled to on *any* farm (*m*), have been held too vague and indefinite to be enforced in equity.

The foregoing principles will apply to any absolute bill of sale, and to any bill of sale executed before November 1, 1882.

Under Act 1882.

By the Bills of Sale Act, 1882, the law relating to after-acquired property under bills of sale to secure the payment of money made after October 31, 1882, has been practically repealed.

By that Act such a bill of sale is void, *except as against the grantor*, unless the personal chattels in it [* 162] are specifically described in a *schedule (*n*), and also is similarly void in respect of any personal chattels specifically described in the schedule (*o*) of which the grantor was not the true owner at the time the bill of sale was executed; unless those personal chattels are either growing crops, or fixtures, plant, or trade machinery substituted for those specifically described in the schedule (*p*). In these two cases the bill of sale is valid although the personal chattels are not described in the schedule and were not then the property of the grantor.

The protection of the Act, however, does not extend to *additions* to the property specifically described in the schedule, or to *future* growing crops—that is, crops not then actually growing (*q*).

Bill of sale may be good only as to then existing specified property.

But a bill of sale within the Bills of Sale Act, 1882, though void except as against the grantor as to after-acquired property, is nevertheless valid as to existing property specifically described in the schedule (*r*).

(*l*) *In re Count d'Epineuil*, 20 Ch. D. 758; but see *Clements* v. *Matthews*, 11 Q. B. D. 808; *The Official Receiver* v. *Tailby*, 17 Q. B. D. 88.

(*m*) *Clements* v. *Matthews*, 11 Q. B. D. 808.

(*n*) Section 4. As to what is a sufficient description, see *Roberts* v. *Roberts*, 13 Q. B. D. 794.

(*o*) Section 5. (*p*) Section 6.

(*q*) Ibid.

(*r*) *Roberts* v. *Roberts*, 13 Q. B. D. 794; *Crosser and Long*, v. *Maxwell*, W. N. (1885) 95, overruling *Levy* v. *Polack*, 52 L. T. (N.S.) 532.

A bill of sale by a company is within the Bills of Sale Act of 1878, except that if unregistered it is not thereby avoided against the liquidator of the company, as he represents the company and its contributories as well as the creditors (*s*). Bill of sale by company.

It has been held that an ordinary bill of sale by a company is as much within the mischief of the Act of 1882 as a bill of sale by a private individual; and therefore a bill of sale by a company, if to secure the payment of money, must be made in compliance with that Act, and duly registered under the Act of 1878 (*t*).

It is only when the security given by a company is a "debenture" (*u*) within the meaning of the exception in section 17 of the Act of 1882 that the document (if a bill of sale) comes within the Act of 1878 alone (*v*).

(*s*) *Re Marine Mansions Co.*, L. R. 4 Eq. 601, 610; *In re Asphaletic Wood Pavement Co.*, 49 L. T. (N.S.) 159; *In re Cunningham*, 28 Ch. D. 682.

(*t*) *In re Cunningham*, 28 Ch. D. 682.

(*u*) *Brocklehurst* v. *Railway Printing and Publishing Co.*, W. N. (1884) 70. As to what is a debenture, see *British India Steam Navigation Co.* v. *Commissioners of Inland Revenue*, 7 Q. B. D. 165, 172, 173.

(*v*) *Ross* v. *Army and Navy Hotel Co.*, 55 L. J. (N.S.) Ch. 697.

*CHAPTER VIII.

WHO ARE ENTITLED TO RANK AS CREDITORS UNDER 13 ELIZ. C. 5.

Who are "creditors and others."

THE statute 13 Eliz. c. 5, is expressed to be to avoid conveyances, &c., "to delay, hinder, or defraud *creditors and others* (*v*) of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs."

It is conceived that the words "*creditors and others*" are wide enough to include any person who has a *legal* demand against the settlor, so that he may rank as a creditor, although at the date of the settlement he may have no legal right to enforce it. The character of the claim, so long as it is a legal one, seems immaterial (*w*).

This is the construction which the statute has received in America, where the words "*creditors and others*" are not restricted to such as are creditors in the strict sense of the word (*x*).

General creditors intended.

The enactment is clearly intended to prevent persons from conveying away the whole or any part of their property in derogation of the rights of those who as *general* creditors have a claim on the general assets of their debtor (*y*).

Nor mortgagees.

Mortgagees, therefore, who have a specific portion of property set aside, and, so far as their interest is concerned, freed from liability to the general debts, and to which they can, primarily at least, resort for the satisfaction of their claim, are not to be regarded as "creditors," or at least a mortgage debt is not properly speak-

(*v*) Ante, p. 64.
(*w*) Post, p. 184.
(*x*) See 13 Eliz. c. 5, s. 2; *Taylor* v. *Atkinson*, 2 Atk. at p. 600; *Holmes* v. *Penney*, 3 K. & J. 100; *In re Ridler*, 22 Ch. D. 74; ante, p. 64; post, pt. vi. ch. i.; Bump. Fr. Conv. (Amer.), 2nd ed. 491, 492.
(*y*) *George* v. *Milbanke*, 9 Ves. 190, 196.

ing a debt for the purposes of the statute (*z*), for a fully * secured debt is generally excluded from [* 164] an estimate of liabilities. There seems at one time to have been some uncertainty on the point, and some confusion as to whether mortgagees were to be looked upon as creditors under this statute, or as purchasers under 27 Eliz. c. 4 (*a*); but it has been decided that they are purchasers under the latter statute (*b*). If the property mortgaged is not sufficient to satisfy the debt, the mortgagee of course will be a creditor for the balance (*c*).

Unless for surplus.

Mortgagee relinquishing security.

And a mortgagee may, by relinquishing the security of his mortgage, become entitled to sue as a creditor; so that where a plaintiff who had an equitable mortgage sued in the double character of purchaser and creditor, although the deed was held void against him as a purchaser (*d*), it was held (on a question of costs) that he had a right to sustain the suit as a creditor (*e*).

Barrack v. *McCullock*: husband creditor of a person to whom his wife had given money to invest for her.

In *Barrack* v. *McCullock* (*f*), the plaintiff was held to be a creditor under the following circumstances:—M. was a friend of the plaintiff and his wife; the wife had, without her husband's knowledge, from time to time given M. money to invest for her benefit. This money she took partly out of the profits of her husband's business, and partly, during the time when the business was being carried on by trustees for the benefit of her husband's creditors, out of moneys allowed to her from time to time by such trustees. M. furnished an account of investments which he represented he had made with the moneys so given to him, but it was found on his death that such investments were not then in existence, if they had ever been made; and the

(*z*) *Stephens* v. *Olive*, 2 Bro. C. C. 90; *Lush* v. *Wilkinson*, 5 Ves. 384; *Freeman* v. *Pope*, L. R. 5 Ch. 538; and see *Ex parte Huxtable*, 2 Ch. D. 54.

(*a*) See 1 Eq. C. Ab. 148, pl. 1, where the case of *Dolin* v. *Coltman*, 1 Vern. 294 (in which an agreement was set aside as fraudulent against subsequent mortgages), is put under the heading of "What conveyance or disposition shall be fraudulent as to creditors," and the 13 Eliz. c. 5, is cited in the margin; and see *Naylor* v. *Baldwin*, 1 Rep. Ch. 69; *Girling* v. *Lowther*, 2 Rep. Ch. 136; post, pp. 208 et seq.

(*b*) *Lister* v. *Turner*, 5 Hare, 281; *Dolphin* v. *Aylward*, L. R. 4 H. L. 486.

(*c*) *Harman* v. *Richards*, 10 Hare, 81; and see *Doe* v. *Knight*, 5 B. & C. 671, 695.

(*d*) See *Doe* v. *Knight*, 5 B. & C. 671, 695; and *Ede* v. *Knowles*, 2 Y. & C. Ch. 172.

(*e*) *Lister* v. *Turner*, 5 Hare, 281.

(*f*) 3 K. & J. 110.

plaintiff now claimed against M.'s estate the moneys so given to him, and interest thereon. It was held by Lord Hatherley (then Sir W. P. Wood, V.C.) that the [* 165] husband, the plaintiff, was entitled to sue * as a creditor of the estate of M., to set aside investments of stock made by him in his lifetime in the names of trustees for the benefit of his daughters.

Wife creditor on husband's covenant with her trustees.

In *Rider* v. *Kidder* (*g*) a husband on his marriage covenanted with the trustees of the settlement, in case his intended wife should survive him, within twelve months next after his decease to pay her £3000, with interest at 4 per cent. per annum, for her own use, and in case there should be any issue, to pay to the trustees within the time aforesaid £2000, with the same interest, upon trust for the benefit of the wife and children; and Lord Eldon was of opinion that under this covenant the wife was a creditor of the husband's estate after his death, as against a fraudulent conveyance made by him (*h*).

Debts founded in maleficio.

In *Lewkner* v. *Freeman* (*i*) a curious distinction was taken between debts founded in maleficio and real debts. After the plaintiff had brought his action against M. for lying with his wife, M. made a conveyance of his land to trustees for the payment of certain scheduled debts and such other debts as he should appoint. The plaintiff recovered £5000 damages against M. and brought his bill to be relieved against the deed as fraudulent against him and made to defeat him of his debt. *Per Curiam:* "This deed is not fraudulent, either in law or equity, for such debts as are named in the deed; for the plaintiff was no creditor at the making of the deed; and though it were made with an intent to prefer his real creditors to this debt, when it afterwards came to be a debt, yet it was a debt *founded in maleficio*, and therefore it was conscientious in him to prefer the other debts before it." But the plaintiff was allowed to have an interest in the surplus after the other debts were paid (*k*).

A creditor of an ancestor of the author of a voluntary settlement is a creditor of the heir to whom lands

(*g*) 10 Ves. 360; *Ex parte Robinson*, 1 Moll. 291.
(*h*) 10 Ves. 369.
(*i*) 1 Eq. C. Ab. 149. See S. C. Prec. Ch. 105, and Freem. Ch. 236.
(*k*) See *Pickstock* v. *Lysler*, 3 M. & S. 371; ante, pp. 105 et seq.

have descended from that ancestor. So where a man to whom lands had descended as the heir of his father made a voluntary settlement of them, it *was [* 166] held void as against his father's creditors; and the Court agreed "that the conveyance of the heir shall be fraudulent as a conveyance by the father, who is the principal debtor" (*l*). In *Gooch's Case* (*m*) the plaintiff brought his action in the Court of King's Bench against the defendant, as heir to his father, in debt on a bond made by the father, in which he bound himself and his heirs; to the plea of riens per descent the plaintiff proved that the father died seised of certain lands which had descended to the defendant as his heir; in answer to which the defendant gave in evidence a feoffment in fee made by him before this action. Plaintiff's counsel alleged and proved that this was made by fraud and covin to defeat the then action. But it was strongly urged and insisted on, that it ought to have been pleaded, and could not on this issue (of riens per descent the day of the writ purchased) be given in evidence. The Court, however, declared that the plaintiff, who was a stranger to it, could not be driven to *plead* the feoffment, of which he had no knowledge, but might give it in evidence (*n*), and that the statute was to be favourably interpreted for the suppression of fraud.

Ancestor's debts avoid the heir's voluntary conveyance.

So a voluntary conveyance by a devisee is void against the creditors of the testator (*o*).

Or that of devisee.

But (in the absence of special circumstances) land is not liable to the debts of the ancestor after it has been alienated by his heir or devisee for the purposes of a marriage settlement (*p*).

But not his conveyance for value.

A voluntary conveyance by an executor or administrator is void as against the creditors of the testator or intestate (*q*).

Or by an executor or administrator.

(*l*) *Gooch's Case*, 5 Rep. 60 a; *Apharry* v. *Bodingham*, 1 Cro. Eliz. 350; *Richardson* v. *Horton*, 7 Beav. 112; Shep. Touch. 66.

(*m*) 5 Rep. 60 a.

(*n*) See *Kidney* v. *Coussmaker*, 12 Ves. 136, 155, as to the difference between cases where a bill in Chancery is filed expressly to set set aside a settlement, and where the settlement first comes out in the answer; and post, pt. vi. ch. i.

(*o*) *Gooch's Case*, 5 Rep. 60; *Apharry* v. *Bodingham*, 1 Cro. Eliz. 350.

(*p*) *Mathews* v. *Jones*, 2 Anstr. 506; *Richardson* v. *Horton*, 7 Beav. 112, 124, post, p. 333.

(*q*) *Doe* v. *Fallows*, 2 Tyr. 460.

Surety is a creditor on his bond for indemnity.

A surety to whom a counter bond has been given to indemnify him; having paid the debt for his principal, is a creditor of his principal (*r*), and, in equity, though he had no counter bond (*s*).

Wife sequestrating is a creditor.

[* 167] * A wife in whose favour sequestration was issued by the Ecclesiastical Court in a suit for divorce was held entitled to set aside a settlement by her husband under this Act (*t*).

Creditors under voluntary instruments.

Although as against creditors a voluntary bond will not prevail (*u*), a creditor under a voluntary covenant (*v*) or bond (*w*), although post obit (*x*), is as much entitled to the benefit of the statute, even in equity, as any other creditor (*y*). In *Adams* v. *Hallett* (*z*) a man by voluntary post obit bond secured to his daughter-in-law an annuity for her life, and afterwards made a voluntary settlement comprising nearly all his property. It was held that she, as a creditor under the bond, was entitled to set aside the settlement. Sir G. M. Giffard, V.C., said that "if the bond had been for value the only objection would have been that it was post obit;" but that made no difference, because the settlor, by making the settlement, abstracted from his property that which was absolutely essential to satisfy the bond, and that it mattered not how long afterwards the bond became due; and that the bond being voluntary made no difference, for in considering the statute in a suit of this description you look at what the legal rights of the parties are (*a*), and as the creditor under

(*r*) See *Osborn* v. *Churchman*, Cro. Jac. 127, which, however, only decided him to be a creditor within the 13 Eliz. c. 7 (Bankruptcy). See also *Read* v. *Potter*, Cro. Jac. 140; *Worsley* v. *Dematos*, 1 Burr. 467,474, 482.

(*s*) *Ford* v. *Stobridge*, Nels. 24.

(*t*) *Blenkinsopp* v. *Blenkinsopp*, 1 De G. M. & G. 495.

(*u*) *Fairebeard* v. *Bowers*, Prec. Ch. 17, 2 Vern. 202; *Ex parte Spurrier* Mont. 246; *Goldicutt* v. *Townsend*, 28 Beav. 445; *Lomas* v. *Wright*, 2 My. & K. 769; and see *Hunt* v. *Maunsell*, 1 Dow. 211.

(*v*) *Fletcher* v. *Fletcher*, 4 Hare, 67; *Alexander* v. *Brame*, 19 Beav. 436, S. C. 7 De G. M. & G. 525; *Lomas* v. *Wright*, 2 My. & K. 769.

(*w*) *Lechmere* v. *Earl of Carlisle*, 3 P. Wms. 222; *Payne* v. *Mortimer*, 1 Giff. 118.

(*x*) See, as to post obit bond, *Ramsden* v. *Jackson*, 1 Atk. 292.

(*y*) *Markwell* v. *Markwell*, 34 Beav. 12; *Williamson* v. *Codrington*, 1 Ves. 511, 514; *Cox* v. *Barnard*, 8 Hare, 310.

(*z*) L. R. 6 Eq. 468.

(*a*) See *Hervey* v. *Audland*, 14 Sim. 531; *Beard* v. *Nutthall*, 1 Vern. 427.

this bond would have been a perfectly good creditor at law and was constituted a creditor by an act inter vivos, there was no reason why he should not be so in equity

In this case, it will be observed, the necessary effect of the settlement was to prevent the settlor from leaving at his death sufficient assets for satisfaction of the voluntary bond, and in the event the actual effect of the settlement was to prevent that payment; but where there are no facts from which it can be * rea- [* 168] sonably inferred that the testator knew or believed, or had just reason to believe, that his assets, after deducting the property settled, would not be sufficient to pay a post obit bond in addition to debts contracted for value, the settlement will stand (*b*). In such cases of volunteers on both sides, the burden of proving that the deed was executed with a view to defraud creditors falls on the person claiming under the bond (*c*); but it is only when the voluntary debt is actually created that the volunteer becomes a creditor.

If during the proceedings the creditor becomes a debtor to the settlor on a balance of account, the proceedings cannot be maintained (*d*).

Promissee of voluntary note.

And it appears that a person to whom, or to a trustee to whom, a voluntary promissory note, or in fact any instrument creating a legal debt (*e*), has been given is in the same position as the holder of a voluntary bond (*f*).

Voluntary assignee of a debt.

It seems that formerly the voluntary assignee of a debt was not a creditor; for an assignment of a chose in action conveyed no legal right, and operated in equity as a mere agreement, which, if voluntary, could not be enforced by the assignee, and he therefore, not having an enforceable right, was not a creditor (*g*). Now, however, under the Judicature Act, 1873, an absolute assignment in writing under the hand of the assignor of any debt, subject to giving notice of it in

(*b*) Ante, pp. 38, 42, 50.

(*c*) Per Lord Romilly, in *Dening* v. *Ware*, 22 Beav. 185, 189. That a voluntary covenant may be made the foundation of a creditor's suit in equity, see *Watson* v. *Parker*, 6 Beav. 283.

(*d*) *White* v. *Witt*, 24 W. R. 727.

(*e*) See *Williamson* v. *Codrington*, 1 Ves. 511, 514.

(*f*) *Burkitt* v. *Ransom*, 2 Coll. 395; *Dawson* v. *Kearton*, 3 Sm. & Giff. 186; *Lloyd* v. *Chune*, 2 Giff. 441.

(*g*) *Sewell* v. *Moxsy*, 2 Sim. (N.S.) 189.

writing to the debtor, transfers the legal right to such debt, and it is conceived that a voluntary assignee of a debt would be deemed a creditor (*h*).

So in America, whoever may become the owner of the debt can enforce it, since the right to avoid the transfer is not merely personal (*i*).

But not as against value.

[*169] *But to upset a transaction for value as fraudulent against creditors the creditor impeaching must be for value (*k*).

Forfeitures on felony, outlawry, &c.

Rights of the Crowns.

It is expressly mentioned in the preamble that "creditors and others" are to be protected with respect to "forfeitures," and, as might be expected, the statute has been liberally expounded to guard the rights of the Crown in this respect; for forfeitures are to be considered as debts within the statute. Thus in *Pauncefort* v. *Blunt*, cited in *Tuyne's Case* (*l*), it was resolved that the statute extended to a case where "P. being indicted for recusancy, for not coming to divine service, and having an intent to flee beyond sea, and to defeat the Queen of all that might accrue to her for his recusancy or flight, made a gift of all his leases and goods of great value, coloured with feigned consideration, and afterwards fled beyond sea, and afterwards was outlawed on the same indictment." For "this Act doth not extend only to creditors, but to all others who had cause of action or suit, or any penalty or forfeiture," &c. And it was resolved that "this word 'forfeiture' should not be intended only of a forfeiture of an obligation, recognizance, or such like (as it was objected by some that it should, in respect that it comes after damage and penalty), but also to everything which shall by law be forfeited to the King or subject. And therefore if a man, to prevent a forfeiture for felony or by outlawry, makes a gift of all his goods and afterwards is attained or outlawed, these goods are forfeited notwithstanding this gift. The same law of recusants; and so this statute is expounded beneficially to suppress fraud" (*m*). The case of *Rex* v. *Nottingham* (*n*), and *Sir Walter Raughlies' Case*

(*h*) Section 25 (6); post, pt. v. ch. ii.
(*i*) See Bump. Fr. Conv. (Amer.), 2nd ed. 495.
(*k*) *Sanders* v. ——, Holt, 327.
(*l*) 3 Rep. 82 a. See also *Lenthal's Case*, cited in *Sagitary* v. *Hide*, 2 Vern. 44; and other cases, ante pp. 71 et seq.
(*m*) See also Ro. Ab. pt. 2, p. 34. (*n*) Lane, 42.

there cited, differ from this in that the conveyances were held void though it did not appear that there was any express intention of avoiding forfeiture. In the former case, however, there was a power of revocation.

In *Shaw* v. *Bran* (*o*) it was said that a deed of sale executed by a man on the eve of his trial for a capital offence, of which he was afterwards convicted, could not be supported without proof of *the con- [*170] sideration, although if bonâ fide and for a good consideration it would prevail (*p*), but not if voluntary (*q*).

Sales for value good.

In one case (*p*), the deed being held to be on valuable consideration, Lord Loughborough decided in favour of its validity without going into the question whether the statute applies to the King. But it seems that a valuable consideration is not always enough; there must be also bona fides on the part of the purchaser (*r*), and the alienation must be effected before actual conviction; but where the record of conviction stated that the prisoner was convicted at the assizes holden on the 19th day of the month, but he had assigned his goods bonâ fide and for value on the 20th, and was *actually* convicted on the 24th, the assignment was held good (*s*).

If bonâ fide and before actual conviction.

Crown stands in outlaw's place.

Where a settlement void against his creditors has been made by a person who is afterwards outlawed, if the settlement was not made for the purpose of defeating the rights of the Crown under the outlawry, or under such circumstances as to induce the presumption of such a purpose, the Crown will not be a creditor of the outlaw, but will take only that to which the outlaw himself was entitled at the date of the outlawry (*t*).

Representatives of creditors are creditors.

The representatives of creditors are considered as creditors within the statute.

An assignee, therefore (*u*), or trustee (*v*) of an in-

(*o*) 1 Stark. 319.
(*p*) *King* v. *Brewen*, 2 Bro. C. C. 93, n.; *Allibon* v. *Attorney-General*, Colles, P. C. 393.
(*q*) See ante, pp. 71 et seq.
(*r*) See *Perkins* v. *Bradley*, 1 Hare, 219.
(*s*) *Whitaker* v. *Wisbey*, 12 C. B. 44.
(*t*) *Goldsmith* v. *Russel*, 5 De G. M. & G. 547, 555.
(*u*) 1 Geo. 4, c. 119, s. 7; *Ware* v. *Gardner*, L. R. 7 Eq. 317.
(*v*) 32 & 33 Vict. c. 71 ss. 14 et seq., and 46 & 47 Vict. c. 52, ss. 56, 57.

Assignees and trustees in bankruptcy, &c.

solvent or liquidating debtor or bankrupt, although in right of the debtor he only takes such interest as the debtor was beneficially entitled to, yet represents the creditors also for all purposes, and if any fraud against creditors exists in a transaction to which the insolvent or liquidating debtor or bankrupt was a party the assignee or trustee may take advantage of it. A deed which is void as against creditors is void also as against those who represent creditors (*w*). So Lord [*171] Loughborough said in *Anderson* *v. *Maltby* (*x*), "Assignees have all the equity the creditors have, and may impeach transactions which the bankrupt himself would be stopped from impeaching;" in fact, assignees have frequently been allowed as creditors under the statute without question (*y*).

Sheriff or other officer executing process for creditor is a creditor.

Fraudulent deeds.

On this principle it has been held that a sheriff, bailiff of a county court, or other officer executing a process against a debtor in right of a creditor, may treat a fraudulent deed as void, and seize notwithstanding (*z*). In *Lovick* v. *Crowder* (*a*) Lord Tenterden said: "Now, if a party be in possession of goods, apparently the property of a debtor, the sheriff, who has a fi. fa. to execute, is bound to inquire whether the party in possession is so bonâ fide, and if he find the possession is held under a fraudulent bill of sale he is bound to treat it as null and void, and levy under the writ."

Sheriff seizing after fraudulent execution.

As to cases in which *execution* has been obtained fraudulently to protect the property from subsequent seizure, the question whether the sheriff could, nevertheless, take the goods and sell them under a later writ, is one on which, although many even of the later cases

(*w*) Per Parke, B., in *Doe* d. *Grimsby* v. *Ball*, 11 M. & W. 531, 533; see also *Butcher* v. *Harrison*, 4 B. & Ad. 129, 1 Nev. & M. 677; *Sims* v. *Thomas*, 12 Ad. & E. 536; *Holmes* v. *Penney*, 3 K. & J. 90–102; *Steel* v. *Brown*, 1 Taunt. 381; *Kent* v. *Riley*, L. R. 14 Eq. 190; *Ex parte Russell*, 19 Ch. D. 588; *Ex parte Chaplin*, 26 Ch. D. 319; post, pt. vi. ch. i.

(*x*) 2 Ves. Jun. 244, 255; *Martin* v. *Pewtress*, 4 Burr. 2477.

(*y*) *Acraman* v. *Corbett*, 1 J. & H. 410; *Ex parte Robinson*, 1 Moll. 291; *Tarleton* v. *Liddell*, 17 Q. B. 390, 397–9; *Goodricke* v. *Taylor*, 2 D. J. & S. 135; and see *Ex parte Butters*, 14 Ch. D., per James, L.J., 267.

(*z*) Dyer, 295 a (vol. 3); quoted and approved in *Imray* v. *Magnay*, 11 M. & W. 267–8; *Gale* v. *Williamson*, 8 M. & W. 405; *Bucknal* v. *Roiston* Prec. Ch. 287; *White* v. *Morris*, 11 C. B. 1015; *Scarfe* v. *Hallifax*, 7 M. & W. 288; and see *De Medina* v. *Grove*, 10 Q. B. 152.

(*a*) 8 B. & C. 132, 135; *Paget* v. *Perchard*, 1 Esp. 205.

have decided that he may do so, there has been more diversity of opinion (*b*).

It has been argued that the first deed or judgment, even if fraudulent, is good between the parties themselves and between either of the parties and a stranger other than a creditor; that the sheriff or other officer is a *stranger* unless he can prove that he seized (under the second execution) by legal authority on behalf of a creditor (*c*). This question was first raised in *Lake* v. *Billers* (*d*), and it was there decided that "as it was an action of trespass * by a third party (for [* 172] whom a prior fraudulent execution had issued) the defendant, though sheriff, ought to give in evidence a copy of *the judgment*. But it would have been otherwise if the trespass had been brought by the person against whom the fi. fa. issued." This was followed and approved in *Martin* v. *Podger*, (*e*) and other cases (*f*); but this state of the law was disturbed by the case of *Bessey* v. *Windham*, (*g*), in which it was decided that the mere recital of the writ of fi. fa. in the warrant was sufficient evidence of the sheriff's authority. The warrant in that case was put in by the plaintiffs as evidence against the sheriff (the defendant) in order to connect him with the act of trespass; and, no doubt, against the sheriff the recital was proof of the seizure. So in *Goss* v. *Quinton* (*h*) on which the decision in *Bessey* v. *Windham* (*g*) was partly founded) an agreement, of which the defendant required proof, had come out in an examination of him in bankruptcy; this examination the *plaintiffs put in* in order to prove another point against the defendant, on which it was held that the agreement formed part of the examination, and that, if any part of the examination were read, the whole of such examination must be considered as being in evidence.

Fraudulent judgment good against strangers.

Sheriff must prove he was acting for a creditor

by copy of judgment.

Bessey v. *Windham.*

So also in *Haynes* v. *Hayton* (*i*), the other case re-

(*b*) See *West* v. *Ship*, 1 Ves. 239, 245; post, p. 174.
(*c*) *Martin* v. *Podger*, 2 W. Bl. 701; *Turvil* v. *Tipper*, Latch, 222; *Bessey* v. *Windham*, 6 Q. B. 166; *White* v. *Morris*, 11 C. B. 1015.
(*d*) 1 Ld. Raym. 733.
(*e*) 2 W. Bl. 701.
(*f*) *Glade* v. *Wentworth*, 6 Q. B. 173, n.; *Ogden* v. *Hesketh*, 2 C. & K. 772, et infra.
(*g*) 6 Q. B. 166.
(*h*) 3 Man. & G. 825, 829.
(*i*) 6 L. J. (O.S.) K. B. 231.

lied on in *Bessey* v. *Windham* (*k*), a letter which was put in by the plaintiff against the sheriff contained proof of his authority. All that Lord Tenterden said was (reading the letter): "You are to make this evidence against the sheriff, and yet not give him credit for an assertion there made which is in his favour. This seems to me to be the hardest measure possible." But this is evidently a very different affair from allowing the sheriff to prove his authority as against third parties by his own warrant reciting the writ, more especially as the cases quoted above shew that the production of the writ itself is not enough. By the case of *White* v. *Morris* (*l*), the law was brought back to its former state. There the Court of Common Pleas (*m*) unanimously overruled the decision in *Bessey* v. [* 173] * *Windham* (*n*). Jervis, C.J., there said: "It is an established rule of law, never doubted until the case of *Bessey* v. *Windham* (*n*), that the mere production of the writ, and nothing more, will not enable the sheriff to shew that a deed, good against all except creditors, is fraudulent and void. He must shew that he represents a creditor. For this purpose the bare production of the writ is not enough. The writ merely authorizes and directs the sheriff to do a certain act, and his indorsement or return thereon is a mere statement that he has done as he was directed. There is no statement that a judgment exists, but only that somebody says that a judgment has been obtained." (*o*).

White v. *Morris.*

In *Ogden* v. *Hesketh* (*p*) the sheriff of the County Palatine of Lancaster was sued for wrongful seizure and sale, and defended himself on the ground that the assignment by which the plaintiff claimed was void against creditors. Although the proof of the warrant was not allowed to be enough, yet the mandate from the Chancellor of the Duchy to the sheriff having been put in, it was held that as in the County Palatine the writ was sent to the Chancellor and not to the sheriff,

Chancellor's mandate.

(*k*) 6 Q. B. 166, 172.
(*l*) 11 C. B. 1015.
(*m*) Jervis, C.J., and Maule, Cresswell, and Williams, JJ.
(*n*) 6 Q. B. 166.
(*o*) In ordinary cases, apart from the statute of Elizabeth, it is enough to shew the writ only and not the judgment in justifying under a writ of execution; but the party himself even then must prove the judgment, so that the principle is the same: *Cotes* v. *Michill*, 3 Lev. 20; *Moravia* v. *Sloper*, Willes, 30, 34; *Andrews* v. *Marris*, 1 Q. B. 3. 17.
(*p*) 2 C. & K. 772.

who in fact never saw the writ, but acted entirely by virtue of the Chancellor's mandate, the production of the mandate was a sufficient proof of the authority of the sheriff, although it contained no recital of the writ of fi. fa. But if the writ is not sufficient in ordinary cases, it is hard to see how the Chancellor's mandate can be sufficient proof to connect the sheriff with the creditor or creditors, against whom alone the fraudulent assignment was void.

Writ of execution and the judgment must be proved.

But this case was decided before the law on the subject had been again established by *White* v. *Morris* (*q*) and the other cases mentioned above, and it therefore may be regarded as clear that where a sheriff justifies a seizure made by him as against third persons—any person except the debtor himself—he must produce *both* the writ of execution and the judgment; and he cannot be *relieved from offering such proof [* 174] by any recital in the warrant which his opponent may put in evidence as proof of the seizure (*r*).

Evidence as to fraud in actions by persons impeaching prior judgments and executions.

Questions have arisen as to whether, in an action against the sheriff for not executing a writ in spite of a previous seizure alleged to be fraudulent, evidence of the fraud is admissible.

There are some cases in which the first *execution* alone has been impeached, and others in which it has been necessary to impugn the bona fides both of the execution and the judgment on which it was founded.

Prior execution alone impeached.

As to the first class of cases, Lord Hardwicke said, in *West* v. *Skip* (*s*), that "if a creditor, by fi. fa. seize the goods of the debtor, and suffer them to remain long in the debtor's hands, and another creditor obtains a subsequent judgment and execution, it has been determined often that it is evidence of fraud in the first creditor, and the goods in the hands of the debtor remain liable." But in *Bradley* v *Wyndham* (*t*), where no actual possession was given under the first execution, it was left to a jury to say whether it was fraudulent or no.

(*q*) 11 C. B. 1015.
(*r*) 1 Tayl. 20, 8th ed. 646.
(*s*) 1 Ves. 239, 245, cited and followed in *Lovick* v. *Crowder*, 8 B. & C. 136; and see *Smallcomb* v. *Buckingham*, 1 Salk. 320, and (as *Smallcomb* v. *Cross*) 1 Ld. Raym. 251.
(*t*) 1 Wils. 44; and see *Day* v. *Waldock*, 1 Dowl. 523.

Evidence of execution *and* judgment being fraudulent in action by person impeaching a prior judgment.

The question whether evidence that not only the prior execution but also the *judgment* was fraudulent against the plaintiff—a creditor seeking to enforce a subsequent execution—could be admitted, was for some time left undecided. In *Warmoll* v. *Young* (*u*), the plaintiff brought his action against the sheriff for not executing his writ of fi. fa. His defence was that he had previously levied at the suit of K., and the answer to that defence was that K.'s judgment was fraudulent. Lord Tenterden received the evidence on the authority of a decision of Lord Kenyon's (*v*), which, however, turns out not to be conclusive, as the sheriff was there indemnified by the creditor, and the action, moreover, was by the first creditor, who had obtained judgment and execution.

In *Barber* v. *Mitchell* (*w*) it was said that the question whether the judgment first obtained was fraudu- [* 175] lent or not could not be * raised in an action against the sheriff; for that purpose an issue must be directed; but that the question whether the first execution was fraudulent *with the sheriff's knowledge*, might be raised in an action against him. But in *Tyler* v. *Duke of Leeds* (*x*) Lord Ellenborough seems to have thought evidence admissible to impeach the judgment on which the action for a false return was founded. In a case (*y*) of an action against the sheriff by a judgment creditor for falsely returning nulla bona to a writ of the plaintiff, in which the sheriff, being indemnified, had sold the goods under a writ subsequent in date to the plaintiff's, the declaration alleged that the sheriff took in execution goods of the debtor of the value indorsed on the plaintiff's writ, and levied the same thereout. To this the sheriff pleaded that he did not levy the moneys as therein alleged, nor any part thereof, modo et formâ.

Evidence that the plaintiff's judgment was obtained by fraud and collusion with the debtor was objected to. It was held that the words in the declaration, "and then levied the same thereout," must mean that the sheriff had in his hands the proceeds of the sale *for*

(*u*) 5 B. & Cr. 660.
(*v*) *Kempland* v. *Macaulay*, 4 T. R. 436.
(*w*) 2 Dowl. P. C. 574.
(*x*) 2 Stark. 218; see also *Gale* v. *Williamson*, 8 M. & W. 405.
(*y*) *Shattock* v. *Carden*, 6 Ex. 725, 728.

the purpose of handing over to the plaintiff (*z*); that is, that the proceeds of the sale were applicable to the payment of the plaintiff's debt. Unless he had the money for *that purpose* no breach of duty was shewn by their not paying over the money, and in order to shew that the money so received was *not* applicable to that purpose it was open to the sheriff to produce evidence that the plaintiff's judgment was fraudulent; and the return of nulla bona means, no goods to satisfy plaintiff's claim.

Imray v. *Magnay*.

These questions were fully discussed in *Imray* v. *Magnay* (*a*), which was an action brought by a judgment creditor against the sheriff of Middlesex for neglecting to levy, and returning nulla bona. The defence was founded on a previous seizure under a former judgment; and to evidence which was offered to shew that the former judgment and execution was fraudulent and void, it was objected that, in an action against the sheriff, evidence was not admissible of fraud, either in the judgment or in the execution. * At the [* 176] trial the evidence was admitted and the point reserved. The Court decided the evidence was admissible both as to the judgment and the execution, and this must be taken to be the present law on the subject.

Evidence admissible.

Evidence of fraud in action by person whose judgment &c., is impeached.

It is clear, though, that in an action by the creditor under the *first* judgment and execution against the sheriff for trespass in having seized under a subsequent process, evidence as to the fraud or bona fides of the first transaction is admissible (*b*).

Sheriff bound to seize and sell,

In these cases the sheriff not only may, but is bound to, seize and sell the goods in spite of the fraudulent process.

"It is settled by the case of *Imray* v. *Magnay*" (*c*), said Parke, B., in delivering the judgment of the Court of Exchequer in *Christopherson* v. *Burton* (*d*), "that

(*z*) *Drewe* v. *Lainson*, 11 A. & E. 529.

(*a*) 11 M. &. W. 267, followed as to this point (the admission of evidence of fraud) by *Remmett* v. *Lawrence*, 15 Q. B. D. 1004, 1007; and by *Christopherson* v. *Burton*, 3 Ex. 160.

(*b*) *Lake* v. *Billers*, 1 Ld. Raym. 733; *Martin* v. *Podger*, 2 W. Bl. 701; *Paget* v. *Perchard*, 1 Esp. 205; *Riches* v. *Evans*, 9 C. & P. 640; *Bessey* v. *Windham*, 6 Q. B. 166; *Woodham* v. *Baldock*, Gow, 34 S. C. 3 Moo. 11.

(*c*) 11 M. & W. 267, 276.

(*d*) 3 Ex. 160.

where goods seized under a writ of fi. fa., founded on a judgment fraudulent against creditors, remain in the sheriff's hands, or are capable of being seized by him, he is *compellable* to sell, or seize and sell, such goods under a subsequent writ founded on a bonâ fide debt (*e*) ; and if he neglected to do so, *having notice* of the fraud at the time that he ought to have executed the writ, or if he could then have discovered it by reasonable inquiries, he is responsible for neglecting to seize and sell them ; and that it was not necessary, in order to render the judgment void quoad the sheriff on the ground of fraud, that he himself should have been a party to it. The only difference between that case and the present is, that here the sheriff himself had assigned the goods seized under the prior execution to a supposed bonâ fide purchaser innocently and in ignorance of the fraud, and that he ought not to invalidate his own grant. In other respects the cases are the same. Here there was sufficient notice of the fraud to the sheriff to oblige him to inquire into the question of fraud at its peril ; and, there being an admitted fraud, the sheriff is responsible."

although he has sold after notice.

This doctrine questioned.

The doctrine of *Imray* v. *Magnay* (*f*), has not gone [* 177] unquestioned. * In *Remmett* v. *Lawrence* (*g*) the sheriff returned to the plaintiff's writ that he had already levied the goods of J. W., the debtor, on a previous judgment ; the plaintiff brought an action against the sheriff, and produced evidence that the prior judgment was fraudulent. He had given the sheriff notice that he disputed the validity of the first execution, and the sheriff had offered to pay the plaintiff the proceeds on receiving an indemnity, but none was given. It turned out that none of the goods seized really belonged to J. W. Lord Campbell, C.J., said : "When a proper opportunity arises I should like to have the case of *Imray* v. *Magnay* (*f*) reconsidered :" and Sir W. Erle also said : "As to the question whether the sheriff was bound to notice that the prior execution was fraudulent, this case certainly shews that such a doctrine throws great difficulty on the sheriff. He finds a very intricate state of circumstances ; he is threatened if he does not pay over the proceeds ; he offers to do so on being indemnified, but he is required to go on at

Hardship on the sheriff.

(*e*) See *Russell* v. *Cumber*, 1 Keb. 946.
(*f*) 11 M. & W. 267.
(*g*) 15 Q. B. 1004.

his peril, under liability to an action, from which he is relieved only by the accident of having seized goods not belonging to the execution debtor."

On the other hand, it was said by Lord Tenterden (*i*) that though the sheriff must see at his own peril that the party who sets him in action is acting bonâ fide, yet, where he exercises all reasonable caution and himself acts fairly and bonâ fide, he is entitled to apply to the Court for an indemnity from one of two conflicting claimants. But on principle, speaking generally, the sheriff is liable; and it is highly just and proper that he should be so: if it were otherwise, a wide door would be opened for fraud and the officers of the sheriff and the debtors against whose goods process issued would be colluding together for the purpose of making one process the means of defeating another.

Sheriff's liabilty a good principle.

So if the sheriff has various writs of fi. fa. in his hands against the same debtor he is bound to execute them all, giving priority to each in the order in which they came into his hands. He is liable if he does not execute; unless he had notice that the writs are fraudulent (*k*).

*If the sheriff is bound to seize and sell, [*178] notwithstanding a prior fraudulent deed or execution, it is necessary to inquire what evidence he is to be guided by, as to whether or not the prior deed or execution was fraudulent (*l*).

How is the sheriff to decide when an assignment, &c., is fraudulent?

The real question at issue appears to be, whether the first assignment or execution (for the statute places both on the same footing) was a bonâ fide transaction, intended to part with the property in the goods, or whether it was intended that the debtor should keep possession and have his goods back again, and it was all a pretext to keep off subsequent executions, and the debtor was really to have the goods all along (*m*). It seems that where the first execution is delivered to the sheriff with a direction not to sell, that it is of itself sufficient evidence of fraud to warrant the sheriff seizing and sell-

Was it a real transfer or a mere cloak?

Direction not to sell.

(*i*) In *Lovick* v. *Crowder*, 8 B. & Cr. 132.
(*k*) *Dennis* v. *Whetham*, L. R. 9 Q. B. 345.
(*l*) See *Salmon* v. *James*, 1 Dowl. 369; *Day* v. *Waldock*, 1 Dowl. 523.
(*m*) *Riches* v. *Evans*, 9 C. & P. 640, 642; *Bessey* v. *Windham*, 6 Q. B. 166–7; *Twyne's Case*, 3 Rep. 80 b.

ing the same goods under a subsequent execution (*n*), and it would seem from most of the earlier cases that the mere fact of the first execution not being made use of and the goods remaining in the debtor's actual possession was sufficient (*o*), even though formal possession was given (*p*). The judgment and execution are to be looked at as working an absolute conveyance to the creditor, and where there is "nothing but the absolute conveyance without the possession, that in point of law is fraudulent" (*q*). At all events, the fact of the first execution remaining in the sheriff's hands is sufficient to put him upon inquiry with respect to it (*r*). Although the goods have been actually seized under the prior execution and sold by a bill of sale from the sheriff, yet actual notice that such assignment was fraudulent, and that the debtor is still in possession, renders the sheriff liable (*s*); in such a case the circumstance that the sheriff is obliged to derogate from his own grant and reseize the goods in the hands of the grantee [* 179] *makes no difference, for the grantee, being a party to the fraud, has no right to complain of the reseizure (*t*).

Goods left in debtor's possession.

Intent to defeat execution.

The mere fact that a deed was executed to defeat subsequent executions does not make it fraudulent (*u*) unless it was voluntary (*v*).

Though there was a just debt,

It makes no difference that the fraudulent judgment and execution were founded on a just debt, if they are made a fraudulent use of (*w*).

fraudulent judgment valid against sheriff not acting for other creditors.

A judgment, however, even though fraudulent against creditors, is good between the parties to it, and the sheriff is bound to sell under it, if no bonâ fide creditor

(*n*) *Lovick* v. *Crowder*, 8 B. & C. 132; and see the remarks on this case, *Imray* v. *Magnay*, 11 M. & W. 270. But see *Day* v. *Waldock*, 1 Dowl. 523.

(*o*) *Bucknal* v. *Roiston*, Pr. Ch. 287; *West* v. *Skip*, 1 Ves. 245; ante, p. 174; *Smith* v. *Russell*, 3 Taunt. 400; *Rice* v. *Serjeant*, 7 Mod. 37; *Imray* v. *Magnay*, 11 M. & W. 267; *Christopherson* v. *Burton*, 3 Ex. 160, et supra.

(*p*) *Paget* v. *Perchard*, 1 Esp. 205.

(*q*) *Edwards* v. *Harben*, 2 T. R. 587, 597; ante, pp. 119 et seq. But see *Cole* v. *Davies*, 1 Ld. Raym. 724.

(*r*) *Lovick* v. *Crowder*, 8 B. & C, 132.

(*s*) *Christopherson* v. *Burton*, 3 Ex. 160.

(*t*) *Christopherson* v. *Burton*, 3 Ex. 162; ante, p. 176.

(*u*) Ante, p. 99.

(*v*) Ante, pp. 85, 104 et seq.

(*w*) *Rice* v. *Serjeant*, 7 Mod. 37.

intervenes; and if he thus sells to a bonâ fide purchaser, and not the fraudulent plaintiff himself, he cannot be compelled to re-seize the same goods, for the purchaser has a good title (*x*).

If, however, after seizure, and before sale, the execution creditor becomes disentitled to receive the amount of the judgment debt, the sheriff cannot sell, at least without instructions from the execution creditor (*y*).

Jury summoned by sheriff.

It was formerly the law that as the sheriff was bound at his peril to take only the goods of the defendant, he might summon a jury to try the right to the goods (*z*). But this seems to have been merely a proceeding by the sheriff on his own authority, and not under the King's writ (*a*), and it was held that such an inquisition was not evidence in an action against the sheriff for a false return of nulla bona (*b*), and therefore afforded him no real protection. By the Interpleader Act (1 & 2 Will. 4, c. 58), s. 6 (*c*), and the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 12 (*d*), a sheriff or other officer executing any process may apply to the Court, and the Court may summon the party issuing the process, and any persons * (other than those [* 180] against whom the process issued) claiming the goods, and adjust the claim and relieve the sheriff, whether or not there was any action pending or commenced against the sheriff. But there must be a bonâ fide claim, and not a claim in equity (*e*), actually made to warrant the sheriff in applying under these Acts (*f*); and where he had seized goods which were under distress for rent, the Court refused relief under the Act, though he had

No protection to him.

Interpleader Act.

(*x*) *Imray* v. *Magnay*, 11 M. & W. 267, 276.

(*y*) *Sneary* v. *Abdy*, 1 Ex. D. 299.

(*z*) Gilb. Ex. 21, Dalt. 146, Impey, 153; *Cooper* v. *Chitty*, 1 Burr. 20, 1 W. Blac. 65; *Farr* v. *Newman*, 4 T. R. 621, 633; *Roberts* v. *Thomas*, 6 T. R. 88.

(*a*) *Latkow* v. *Eamer*, 2 H. Blac. 437.

(*b*) *Glossop* v. *Pole*, 3 M. & S. 175; *Latkow* v. *Eamer*, 2 H. Blac. 437; Watson on Sheriffs, 2nd ed. 282.

(*c*) As to bill of interpleader by sheriff before this Act, see *Slingsby* v. *Boulton*, 1 V. & B. 334.

(*d*) See *Bragg* v. *Hopkins*, 2 Dowl. 151; *Allen* v. *Gilby*, 3 Dowl. 143.

(*e*) *Sturgess* v. *Claude*, 1 Dowl. 505.

(*f*) *Isaac* v. *Spilsbury*, 10 Bing. 3; *Slowman* v. *Back*, 3 B. & Ad. 103; *Fenwick* v. *Laycock*, 2 Q. B. 108; *Ford* v. *Bayntun*, 1 Dowl. 357; *Salmon* v. *James*, 1 Dowl. 369; *Day* v. *Waldock*, 1 Dowl. 523; Watson on Sheriffs, 2nd ed. 286.

applied for, and the execution creditor had refused him, an indemnity (*g*).

Sheriff responsible for acts of under-sheriffs or officers.

Of course, the act of a sheriff's bailiff, or the under-sheriff, is the act of the sheriff, whose warrant as between him and them is proof of their authority (*h*). Where there is a prior assignment by A. (and an execution, it is apprehended, is the same), which the sheriff has treated as fraudulent, and levied on the goods as the goods of A., and B., the assignee, has brought his action of trespass for taking *his* goods under a fi. fa. against A.; on the assignment to B. being found valid, it is no defence for the sheriff to say, "My warrants were to take the goods of A.; I gave no authority to my officer to take the goods of any other person, and therefore I am not answerable if goods which did not belong to A. have been taken" (*i*).

New sheriff after fraudulent execution.

It makes no difference that between the fraudulent and the subsequent executions the office of sheriff changes hands. It was the duty of the officers of the second sheriff, when they found the officers of the former sheriff in possession, to inquire into the facts, and it would then have appeared that the first execution was fraudulent (*k*).

Money levied under fraudulent judgment should be recovered by motion to set it aside.

Money levied by a regular execution under a judgment valid on the face of it cannot be recovered back, in an action for money had and received, on the ground that judgment was signed or execution issued fraudulently for the whole sum named in the judgment when part had already been paid. The remedy, in case of such [* 181] * fraud, is by motion to the Court in which the action was brought, to set aside the judgment or execution (*l*).

Creditors may lose their right to avoid a deed

Creditors may, under certain circumstances, lose their rights under the statute; they may be barred by acquiescence in a transaction which they might otherwise have avoided, and even mere notice of it will sometimes have the same effect.

(*g*) *Haythorn* v. *Bush*, 2 Dowl. 641. But see *Smith* v. *Russell*, 3 Taunt. 400.

(*h*) *Gibbins* v. *Phillips*, 6 L. J. (O.S.) K. B. 209.

(*i*) *Ackworth* v. *Kempe*, 1 Doug. 40.

(*k*) *Lovick* v. *Crowder*, 8 B. & Cr. 132.

(*l*) *De Medina* v. *Grove*, 10 Q. B. 152, 172.

Thus in *Steele* v. *Brown* (*m*) the defendants lent C. £200 to buy the lease and fixtures of a public-house belonging to the plaintiff. To secure this they took an assignment of the lease, and a judgment acknowledged by C., who, in payment for the lease and fixtures, handed over the £200 to the plaintiff, and gave him two notes, payable at a future time, and a bill of sale of the furniture. C. was put into possession of the house and goods, but, after nine months, became embarrassed, and the plaintiff took possession of the goods. Soon after, the defendants took the goods in execution under their judgment as the property of C. The defendants failed in proving their judgment; but Lord Mansfield said that, had they proved themselves to be creditors, it was very doubtful whether they could have been in a better situation. "The evidence shewed that the parties agreed to go hand in hand, the defendants having the security of the lease, and the plaintiff the security of the bill of sale of the goods and fixtures;" so that the bill of sale was valid; for such a bill of sale (though no possession given) is good between the parties and creditors who concur (*n*). by acquiescence.

In the same way a creditor who has been a party or privy to an assignment, or who has acted in any way which would be equivalent to an assent, recognition, or approval of it, cannot set it up as an act of bankruptcy (*o*); nor can any person who claims through such creditor.

*In *Oliver* v. *King* (*p*) a father, after a consultation with his brother, in whose judgement he had great confidence, executed a voluntary deed assigning a considerable portion of his property to his two sons, and by his will made the brother and sons executors and trustees, and died. The brother acted under the will until [*182] *Oliver* v. *King*.

(*m*) 1 Taunt. 381; and see *Baldwin* v. *Cawthorne*, 19 Ves. 166; *Clanricarde* v. *Henning*, 9 W. R. 912; *Wall* v. *Cockrell*, 6 Jur. (N.S.) 768, reversed by L. C. 7 Jur. (N.S.) 29; *Bamford* v. *Baron*, cited 4 Camp. 234; *Freeman* v. *Pope*, L. R. 5 Ch. 542.

(*n*) See ante, p. 126. Want of possession is no mark of fraud against creditors who are parties; for they know of the change of possession from other sources.

(*o*) *Bamford* v. *Baron*, 2 T. R. 594, n.; *Tuppenden* v. *Burgess*, 4 East, 230; *Back* v. *Gooch*, 4 Camp. 232; *Hicks* v. *Barfitt*, 4 Camp. 235; *Ex parte Cawkwell*, 1 Rose, 313; *Tope* v. *Hockin*, 7 B. & C. 101, and see 1 L. T. (N.S.) 449; *Ex parte Alsop*, 1 D. F. & J. 289; *Ex parte Stray*, L. R. 2 Ch. 374; but see *Turner* v. *Hardcastle*, 31 L. J. (N.S.) C. P. 193.

(*p*) 8 De G. M. & G. 110.

his death, seven years afterwards, and as trustee concurred in the sale of some land (devised on trust for sale by the will), together with a piece of land, part of that comprised in the voluntary settlement; he never impeached the deed during his life, but was a party (together with the donees under it) to various transactions proceeding on the assumption of its validity. At his death his executors impeached the voluntary deed as void against the brother, as a creditor on a bond made some time before the voluntary deed. It is not stated in the reports whether or not the brother received interest on account of the bond debt up to the time of his death. The Court of Appeal upheld the deed (*p*). Sir G. J. Turner, L.J., said that without examining the facts after the death of the settlor (which would make it stronger), he thought that John King, the brother, never had any right to impeach the settlement. "The deed," he said, "was suggested by John, was prepared according to the instructions given by John, John himself procured the execution of it by James" (the settlor) "and by J. R. and M., the sons of James. The whole transaction appears to have been one carried through, in fact, by the acts and concurrence of John. At all events, the deed was executed with his full consent and concurrence; and," his Lordship thought, "he could not have been permitted to say (and if he could not have been, his executors could not be) that the deed thus executed with his full consent and concurrence was a fraud upon him within the meaning of the statute 13 Eliz. c. 5."

This decision goes further than any other, as it decides that a man may, by *acquiescence and concurrence*, lose a right he once had against an alienation subsequent to his debt. In the other cases of this class the creditor had notice *at the time when he lent the money* (*q*), or the act by which the debt was created and the alienation made were simultaneous (*r*). This decision [* 183] was founded on * the case of *Teasdale* v. *Teasdale*, (*s*), which has generally been supposed to carry to its utmost limits the favour shewn to a purchaser for *valuable consideration* without notice (*t*).

(*p*) 8 De G. M. & G. 110.
(*q*) *Woodham* v. *Baldock*, 3 J. B. Moo. 11; *Myers* v. *Duke of Leinster*, infra.
(*r*) *Steel* v. *Brown*, 1 Taunt. 381. (*s*) Sel. Ca. Ch. 59.
(*t*) Sug. V. & P. 14th ed. 743–4; see notes to *Bassel* v. *Nosworthy*, 2 Wh. & Tu. L. C. 6th ed 5 et seq.

In *Teasdale* v. *Teasdale* (*t*) a son, on his marriage, settled lands of which he and his father thought he was seised in fee. The son died, and it was afterwards found that he was only tenant for life and the father was entitled to the fee simple. Lord King decided in favour of the son's widow against her father-in-law, who was privy to and attested the deed of settlement. There the father and son had, by an unintentional misrepresentation, induced a third person to alter her position and become a purchaser for value; but in *Olliver* v. *King* (*u*) there was no purchaser for value (*v*), and there was in fact no third parties (*w*).

Or by notice.

As to persons who lend their money or give credit after a transfer of property, unaccompanied by possession, has been made, the transfer will not be held fraudulent against them if they had notice of it.

In *Woodham* v. *Baldock* (*x*) the plaintiffs were trustees of one F. under a creditors' deed. They were, therefore, in virtual possession of the property. By the terms of the deed the trustees (the plaintiffs) might allow F. to remain in possession for the purpose of carrying on his trade until the debts due to him were collected and the other property converted into money for the benefit of his creditors. Part of the property was sold by auction, and described as the property of F. removing from A. to B. Matterson, *knowing* (as was decided) that the property belonged to the trustees, advanced money on F.'s account, and took a security on this property, which was then at B. It was decided that M. having notice of the change of property when he lent the money, the deed was not fraudulent as against him.

And in an old case (*y*) the Court inclined to dismiss the bill of *a creditor who, before he lent his [* 184]

(*t*) Sel. Ca. Ch. 59 (*u*) 8 De G. M. & G. 110.

(*r*) See *Raw* v. *Pote*, 2 Vern. 240, where a tenant in tail concealed his title on a marriage settlement being made: this settlement was held good against the estate tail, which, however, was preferred to the claim of a volunteer. This was affirmed by the House of Lords.

(*w*) See the Vice-Chancellor's judgement, 1 Jur. (N.S.) 1066; and *French* v. *French*, 6 De G. M. & G. 95; and see *Marker* v. *Marker*, 9 Hare, 1, 16.

(*x*) Gow, 35, S. C. 3 J. R. Moo. 11.

(*y*) *Sagitary* v. *Hide*, 2 Vern. 44.

money, had notice of the settlement which he impeached, although it contained a power of revocation.

A creditor clearly loses his rights against a deed by holding it out to third persons as valid.

Creditor barred by holding out the deed to third parties valid.

In *Myers* v. *Duke of Leinster* (*z*) the plaintiff, a simple contract creditor, of J. J. H., being fully acquainted with the deed in question entered into a treaty to procure a loan for J. J. H., from on insurance office to pay off a mortgage, after which he was to get a second mortgage for his own demand. He afterwards obtained judgment, and filed a bill to impeach the deed. Sales to a large amount were had under the deed, and other transactions were entered into on the assumption of the deed, which was acted on for nearly twenty years, being valid. Lord St. Leonards (*a*) said the Court would never allow a creditor to impeach a deed which he has held out to an insurance company as a valid deed, on the security of which he might have procured a large sum of money; and certainly then he would never have entered into the consideration whether the deed was valid in part and invalid as to the residue. That was a doctrine the insurance company never would have looked to. The deed was represented to them as a deed under which they might safely advance a great sum in order to pay off existing incumbrances, and the plaintiff was to take a second mortgage. Both the insurance company and the plaintiff were to take their respective securities under and not in opposition to the deed, which he had thus, by his own acts, precluded himself from objecting to (*b*).

Delay only barred by Statutes of Limitation.

The right of a creditor to set aside a deed under 13 Eliz. c. 5, is a legal, and *not* an equitable, right. The fact that the creditor has delayed to take proceedings to set aside a deed under that statute is therefore immaterial, so long as the delay has not been such as to create a statutory bar. Until the right to recover the debt is barred by the Statute of Limitation, the legal right to avoid the deed exists (*c*).

The rights of creditors, however, are not barred by a [* 185] release or * acquiescence, unless such release

(*z*) 7 Ir. Eq. Rep. 146, 166.
(*a*) Then Sir Ed. B. Sugden, Lord Chancellor of Ireland.
(*b*) And see *Aldborough* v. *Trye*, 7 Cl. & F. 436, 463.
(*c*) *In re Maddever*, 27 Ch. D. 523.

is given or such acquiescence is consistent with a full knowledge of the facts. So where a release in an inspectorship deed was executed in ignorance of a settlement afterwards impeached, it was held the rights of creditors were not barred (*d*). So a composition signed by creditors in ignorance of a prior voluntary settlement by the debtor was held not to bar their rights, and the settlement was set aside (*e*). Release and acquiescence, when no bar.

(*d*) *Mackay* v. *Douglas*, L. R. 14 Eq. 106, 123.
(*e*) *Tanqueray* v. *Bowles*, L. R. 14 Eq. 151.

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*PART III.

THE RIGHTS OF PURCHASERS UNDER THE STATUTE 27 ELIZABETH, CAP. 4.

CHAPTER I.

WHAT CONVEYANCES ARE VOID AGAINST SUBSEQUENT PURCHASERS.

Though the word "voluntary" not in the statute

ALTHOUGH, as has been frequently remarked, the statute 27 Eliz. c. 4, speaks only of conveyances, estates, gifts, grants, charges, and limitations of uses made "for the intent to defraud and deceive such persons as shall purchase the same *lands*," &c., and the word "*voluntary*," is never once used in it; yet it has been settled by a variety of cases, extending over nearly the whole period during which the statute has been in operation, that every *voluntary* conveyance is, by the statute, made void as against a subsequent bonâ fide purchaser for value (*a*).

it makes all *voluntary* conveyances void against subsequent purchasers.

The reason of the rule.

The reason of this appears to be, that when the court finds that the same land has been disposed of to two different persons, one of whom has paid for it and the other not, it considers that the volunteer has no right to stand in the way of the purchaser; and, from the mere fact of no consideration having been paid by the former, it presumes such fraud in the two transactions, in their relation to one another, as to bring them within the scope of the Act, and will not allow this presumption to be rebutted (*b*).

Fraud implied from the two transactions.

The fact is, that, the two conveyances being utterly inconsistent, the very execution of the subsequent con-

(*a*) *Doe* v. *Manning*, 9 East, 70; ante, p. 4; *Doe* d. *Newman* v. *Rusham*, 17 Q. B. 723, *Trowell* v. *Shenton*, 8 Ch. D, 325; et infra.

(*b*) *Clarke* v. *Wright*, 6 H. & N. 875. See also *Saunders* v. *Dehew*, 2 Vern. 271. The mortgage, "though subsequent to the settlement, that being voluntary, was a good mortgage."

veyance evinces the *fraudulent intent of the [* 188] former one; or, as was quaintly said in an old case, "because it was a voluntary conveyance at first, and shall be intended fraudulent at the beginning" (*c*); or, as Wilmot, C. J., expressed it (*d*), "the statute was made in favor of subsequent purchasers paying a valuable consideration for their purchases as against persons whose title is not supported by such consideration." By afterwards selling the property the seller so entirely repudiates the former voluntary conveyance and shews his intention to sell, as that it shall be taken conclusively against him and the person to whom he conveyed that such intention existed *when he made the conveyance*, and that it was made in order to defeat the purchaser (*e*).

27 Eliz. c. 4, s. 4.

The 4th section, which makes an exception in favor of all conveyances, &c., had or made "upon or for good (*f*) consideration, *and* bonâ fide," almost implies the necessity of such a construction; for if conveyances, &c., on good consideration *and* bonâ fide are alone excepted, it follows that all which are without good consideration *or* bona fides are within the statute, and without such a construction the statute, it is clear, would have become almost a dead letter.

Exception of conveyances, &c., on "good consideration *and* bonâ fide."

Doctrine well settled.

The case of *Colville* v. *Parker* (*g*), decided or cited 5 Jac. 1. shews that at that time the doctrine was well understood (*h*), and it has been pretty firmly adhered to up to the present time.

Exception.

Almost the only conflict of cases has arisen from the doctrine that in one instance a voluntary conveyance is not void as against a subsequent purchaser for value; and that is *where the consideration for the second deed is grossly inadequate*, and the purchase is, in fact, a contrivance to get rid of the voluntary deed. The difference in this respect was clearly laid down as early as in a case mentioned in *Twyne's Case* (*i*): "That a man

(*c*) *Colville* v. *Parker*, Cro. Jac. 158.
(*d*) In *Roe* v. *Mitton*, 2 Wils. 3rd ed, 358, n.
(*e*) *Doe* d. *Newman* v. *Rusham*, 17 Q. B. 723, per Lord Campbell, C. J.; *In re Barker's Estate*, 44 L. J. (N.S.) Ch. 487, 489.
(*f*) By "good" consideration is intended valuable consideration: 3 Rep. 83 b; ante, p. 84.
(*g*) Cro. Jac. 158, supra.
(*h*) See also *Tonkins* v. *Ennis*, 1 Eq. Ca. Ab. 334. But see *Lord Banbury's Case*, Freem. Ch. 8, 9, A. D. 1676.
(*i*) *Nedham* v. *Beaumont*, 3 Rep. 83 b. See also *Upton* v. *Bassett*, 1 Cro. Eliz. 444.

[* 189] who was of *small understanding and not able to govern the lands which descended to him, and being giving to riot and disorder, by mediation of his friends openly conveyed his lands to them on trust and confidence that he should take the profits for his maintenance, and that he should not have power to waste and consume the same; and afterwards, he being seduced by deceitful and covinous persons, *for a small sum of money* bargained and sold his lands, being of great value; this bargain, although it was for money, was holden to be out of this statute. For this Act is made against all fraud and deceit, and doth not help any purchaser who doth not come to the land for a good consideration, lawfully and without fraud or deceit (*k*); *and such conveyance made on trust is void as to him who purchases the land for a good consideration bonâ fide*, without deceit or cunning."

Doe v. *Routledge*.

Doe v. *Routledge* (*l*), which has always been brought forward (*m*), to shew that at that time (*n*) there was an opinion that voluntary conveyances could sometimes be upheld against fair purchasers, may be referred to this class of cases. There the purchaser paid only £200 for an estate worth £2000 at least; and Lord Mansfield declared the settlement good, and said that there was not a word in the statute that impeached voluntary settlements merely as being voluntary, but as fraudulent and covinous. But it is submitted that this decision is not really opposed to any authority before or since, and that the rule is the same at the present day, and that it can be said with perfect truth now that no voluntary settlement is impeachable merely *as* voluntary, but as fraudulent and covinous.

Voluntary gifts not void simply as voluntary, but as opposed to the interests of fair purchasers.

The mark by which such fraud and covin is known, or from which it is presumed, is that the voluntary settlement is set up against the subsequent one for valuable consideration and bonâ fide; and it is remarkable that very much the same expressions were used by Lord Cranworth in 1857 as those on account of which

(*k*) This is the kind of purchaser as against whom voluntariness is not, or is only primâ facie, evidence of fraudulence, as spoken of in *Lavender* v. *Blackstone*, 2 Lev. 146; *Lord Twynham* v. *Mullins*, 1 Mod. 119; and *Holford* v. *Holford*, 1 Ch. Ca. 216.

(*l*) 2 Cowp. 705.

(*m*) *Doe* v. *Manning*, 9 East, 59; *Clarke* v. *Wright*, 6 H. & N. 880.

(*n*) A.D. 1776.

* Lord Mansfield has been accused of not hav- [* 190]
ing recognized a principle since established (*o*).

In *Cadogan* v. *Kennett* (*p*) Lord Mansfield seems to have been again misunderstood, with the same result. That was a case in which a marriage settlement was impeached under 13 Eliz. c. 5; and, after just mentioning the other statute to shew the distinction he says: "The statute 27 Eliz. c. 4, does not go to voluntary conveyances merely as being voluntary, but to such as are fraudulent. A fair voluntary conveyance may be good against *creditors*." This must either be a misprint for 13 Eliz. c. 5 (*q*), which is the most natural and likely conclusion, or it simply refers to cases where the purchaser does not come before the Court sufficiently qualified to avoid the prior voluntary disposition. In this sense there is not a word in either of these judgments which might not have been said with equal truth at the present time. *Cadogan* v. *Kennett.*

In aid of this view of the case it must be remembered that Lord Mansfield himself (whose decision in *Doe* v. *Routledge* (*r*) and dictum in *Cadogan* v. *Kennett* (*s*) have been so much relied on) had previously decided, in *Chapman* v. *Emery* (*t*), that the settlement there on a wife and children was void as being merely voluntary (*u*).

Even Lord Hardwicke has been accused of erring in the same direction (*v*) and of putting the two statutes on the same footing (*w*); but his judgments on the point, when carefully compared, are thoroughly in harmony with, and may be said to have established, the well-settled doctrine of the present day (*x*). Lord Rule well settled in Lord Hardwicke's time.

(*o*) In *Perry-Herrick* v. *Attwood*, 2 De G. & J. 21, 39. See post, p. 197, where the passage is quoted at length; and see post, p. 218.

(*p*) 2 Cowp. 432, 434.

(*q*) Similar misprints are not uncommon even in reports more recently published. See Finch, 104; 2 Wils. 357; 12 L. J. Ch. 106; 4 D. & War. 427; 3 De G. & J. 189; *Bayspoole* v. *Collins*, 18 W. R. 730 S. C. L. R. 6 Ch. 228.

(*r*) 2 Cowp. 705. (*s*) 2 Cowp. 432.

(*t*) 1 Cowp. 278.

(*u*) See Lord Ellenborough's elaborate judgment in *Doe* v. *Manning*, 9 East, 63.

(*v*) 6 H. & N. 880. (*w*) 6 H. & N. 881.

(*x*) See *Oxley* v. *Lee*, 1 Atk. 625 (A.D. 1736), in which the settlement was ordered to be delivered up though no fraud (see note Sander's ed.). *Newstead* v. *Searles*, 1 Atk. 265 (A.D. 1737).

[* 191] *Hardwicke himself in *Townshend* v. *Windham* (*y*), after clearly explaining the effect of the statute 13 Eliz. c. 5, as to creditors, said: "But on the 27 Eliz. *every voluntary* conveyance made, where afterwards there is a subsequent conveyance for valuable consideration, though no fraud in that voluntary conveyance, nor the person making it at all indebted, yet the determinations are that such mere voluntary conveyance is void at law by the subsequent purchase for valuable consideration" (*z*). So when he says, in *White* v. *Sanson* (*a*): "I hardly know an instance where a voluntary conveyance has not been held fraudulent against purchasers," the natural and only way of reconciling that with his other expressions on the same subject is to suppose he had in his mind the class of cases where the purchaser came to avoid a voluntary deed without being properly qualified (*b*).

The rule as laid down by Lord Hardwicke.

There is no case really opposed to the doctrine, which is now at least settled beyond all doubt (*c*); and the Court can decree a conveyance to be fraudulent within the statute merely for being voluntary; and that without any trial at law (*d*). So it was said by Jessel, M. R., in *Trowell* v. *Shenton* (*e*): "In *Doe* v. *Manning*

If a settlement is voluntary, it is fraudulent under 27 Eliz. c. 4.

In *Walker* v. *Burrows*, 1 Atk. 94, he said: "But upon the statute of the 27 Eliz., which relates to purchasers, there indeed a settlement is *clearly void if voluntary*, that is, not for a valuable consideration, and the subsequent purchasers shall prevail to set aside such settlement." See also *Underwood* v. *Hitchcox*, 1 Ves. 279, 280, and *Townshend* v. *Windham*, 2 Ves. 1, 10. And in *Senhouse* v. *Earle*, 1 Amb. 289, he said: "But that is a voluntary settlement and not in pursuance of the articles, and therefore could not hurt the mortgage; for as against a purchaser (and a mortgagee is such) the law declares a *voluntary* settlement to be void." See also *Shaw* v. *Standish*, 2 Vern. 327 (A.D. 1695); *Watkins* v. *Steevens*, Nels. 160; *Hatton* v. *Neal*, B. N. P. 90 a, 261, 1 Brownlow, 45; *Birch* v. *Blagrave*, 1 Amb. 265.

(*y*) 2 Ves. 10.

(*z*) And thirty-seven years afterwards Lord Thurlow said the rule was such, and so many estates stood upon it, that it could not be shaken; *Evelyn* v. *Templar*, 2 Bro. C. C. 149; and see *Taylor* v. *Stile*, (Ch. 1763, MS.), stated Sug. V. & P. 14th ed. 714.

(*a*) 3 Atk. 412.

(*b*) *Upton* v. *Bassett*, 1 Cro. Eliz. 444; post, p. 218.

(*c*) *Doe* v. *Manning*, 9 East, 59; *Cormick* v. *Trapaud*, 6 Dow, 60; *Leach* v. *Dean*, 1 Rep. Ch. 78; *Roe* v. *Mitton*, 2 Wils. 356; *Twyne's Case*, 3 Rep. 80 b; *Evelyn* v. *Templar*, 9 Bro. C. C. 148, 6 H. & N. 860, 875; *Goodright* v. *Moses*, 2 W. Bl. 1019; *Jenkins* v. *Kemishe*, Hardr. 395, 1 Lev. 150; *Clarke* v. *Wright*, 6 H. & N. 860, 875; *Shurmur* v. *Sedgwick*, 24 Ch. D. 597.

(*d*) *White* v. *Hussey*, Prec. Ch. 13.

(*e*) 8 Ch. D. 325.

(*f*) Lord Ellenborough reviewed the cases, and drew from them the conclusion that, if a settlement was voluntary, it was fraudulent within the meaning of the statute. That decision was in 1807 and has been followed ever since, and to cite cases * of an ear- [* 192] lier date with a view to lead the Court to a contrary conclusion is a mere waste of time."

The meritorious consideration of the first conveyance, as its being a provision for wife and children (*g*), or being founded on strong moral obligations (*h*), will not prevent its being voluntary; nor will the voluntary conveyance having been made by direction of the Court support it against a purchaser (*i*).

Voluntary recovery by tenant in tail with voluntary uses, void.

The statute extends to the case of a tenant in tail suffering a voluntary recovery with a deed to lead the uses also voluntary (*k*). "The case of *Doe* d. *Baverstock* v. *Rolfe*" (*l*), said Lord Campbell (*m*), "is an express authority for so holding. That case was mainly grounded on the case of *Fitzjames* v. *Moys* (*n*) but all the authorities bearing upon this point were then considered, and we" (the Court of Queen's Bench) "think that the conclusion at which the Court arrived on such consideration was correct."

But bars the entail.

In such a case, however, the recovery will be valid so as to bar the estate tail, but the voluntary uses declared will be void against a purchaser, and if all the uses declared are void, the recovery will, it seems, enure to give the tenant in tail the fee simple (*o*).

Trustees interposed, immaterial.

It makes no difference whether the voluntary conveyance be to trustees or directly to the volunteers; if to

(*f*) 9 East, 59.

(*g*) *Watkins* v. *Steevens*, 1 Nels. 160; *Goodright* v. *Moses*, 2 W. Bl. 1019; *Chapman* v. *Emery*, 1 Cowp. 278; *Barton* v. *Vanheythuysen*, 11 Hare, 126, 129; *Shurmur* v. *Sedgwick*, 24 Ch. D. 597.

(*h*) *Stiles* v. *Attorney-General*, 2 Atk. 152; *Dolphin* v. *Aylward*, L. R. 4 H. L. 486; *Cracknall* v. *Janson*, 11 Ch. D. 21, 22; post, p. 198.

(*i*) *Martin* v. *Martin*, 2 Russ. & My. 507.

(*k*) *Tarleton* v. *Liddell*, 17 Q. B. 390.

(*l*) 8 Ad. & E. 650.

(*m*) 17 Q. B. 422.

(*n*) 1 Sid. 133.

(*o*) *Nightingale* v. *Earl Ferrers*, 3 P. Wms. 206; *Stapilton* v. *Stapillon*, 1 Atk. 2; *Robert's Case*, 3 Atk. 308, 313; *Martin* v. *Strachan*, 5 T. R. 107, n.; notwithstanding the older cases, in which it was held that it should enure to the old uses; *Argol* v. *Cheney*, Latch, 82; *Waker* v. *Snowe*, Palm. 359.

trustees and all the cestui que trusts are volunteers, the conveyance to the trustees is void under the statute no less than the interests of the cestui que trusts (*p*).

Settlor's debts immaterial.

[* 193] *And the question whether the settlor was or was not indebted when he executed the voluntary deed is of course immaterial (*q*) with repect to the claims of a subsequent purchaser of the estate.

Notice of the voluntary deed makes no difference.

The fact that before purchasing the purchaser knew and had notice of the prior voluntary settlement makes no difference, if the first conveyance be voluntary and the purchaser a bonâ fide purchaser for value (*r*).

Thus, five years after the statute (*s*) the Court held that, notwithstanding the notice, the prior conveyance was void, "for the notice of the purchaser cannot make that good which an Act of Parliament made void as to him. And true it is quod non decipitur qui scit se decipi (*t*); but in that case the purchaser is not deceived, for the fraudulent conveyance whereof he had notice is void as to him by the said Act, and therefore shall not hurt him, nor is he, as to that, in any manner deceived;" and the purchaser for valuable consideration of an equitable estate is in the same manner protected by equity (*u*).

Artificial fraud.

An artificial and constructive fraud has thus grown out of the interpretation of this statute; and that, in which there is *de facto*, and from the nature of the case, no fraud or fraudulent intention whatever, is declared fraudulent by an arbitrary legal presumption (*v*).

(*p*) *Barton* v. *Vanheythuysen*, 11 Hare, 126; *Townend* v. *Toker*, L. R. 1 Ch. 446, 458; *Lister* v. *Turner*, 5 Hare, 281.

(*q*) *Rex* v. *Nottingham*, Lane, 47; *White* v. *Stringer*, 2 Lev. 106; *Townshend* v. *Windham*, 2 Ves. 11; ante, pp. 15, 191.

(*r*) *Evelyn* v. *Templar*, 2 Bro. C. C. 148; *Chapman* v. *Emery*, 1 Cowp. 278; *Doe* v. *Rusham*, 17 Q. B. 723, 725; *Doe* v. *Manning*, 9 East, 59; *Bayspoole* v. *Collins*, L. R. 6 Ch. 232; *Peter* v. *Nicolls*, L. R. 11 Eq. 391; *Fletcher* v. *Ketteman*, 40 L. J. (N.S.) Ch. 624. But see *Watkins* v. *Steevens*, Nels. 160; post, p. 196.

(*s*) *Gooch's Case*, 5 Rep. 60. See also *Gardiner* v. *Painter*, Sel. Ca. in Ch. 65; *Roe* v. *Mitton*, 2 Wils. 356, 358 b; *Goodright* v. *Moses*, 2 W. Bl. 1019; *Tonkins* v. *Ennis*, 1 Eq. C. Ab. 334.

(*t*) So also in the civil law: "Nemo enim videtur fraudare eos qui sciunt et consentiunt": Dig. lib. 42 tit. 8, par. 6, sec. 9.

(*u*) *Buckle* v. *Mitchell*, 18 Ves. 110; *Barton* v. *Vanheythuysen*, 11 Hare, 126, 130.

(*v*) "Quæ naturâ videntur honesta esse, temporibus, sunt inhonesta": Cic. De Off. lib. 3; and see *In re Ridler*, 22 Ch. D., per Cotton, L.J., 82.

The reasoning on which this doctrine is founded, if sound, is at least purely technical, and would seem to extend the operation of the statute beyond the limits of its usefulness. *It is absurd to say that it is [* 194] necessary for the protection of a purchaser to make void as to him a voluntary conveyance of which he is aware; for he need not buy unless he chooses (*w*). On the contrary, the rule can hardly ever be of any practical use to a really fair purchaser, who, having notice of the voluntary deed, could not be advised to purchase a lawsuit by buying the property. For the apparently voluntary deed might at any time within the Statutes of Limitation be set up against him as not really voluntary. Reasons against the rule.

A deed apparently voluntary may be supported by proof of consideration (*x*), or by considerations which arise subsequently to the deed (*y*). The purchaser would have either to bring an action for specific performance against the vendor and the volunteers, to have the invalidity of the previous conveyance established, with the chance of failing in this attempt; or, if he should not care to venture on this, he is in no better position than he would have been in if the previous conveyance was not void against him with notice —he must relinquish his bargain. The rule does not harmonize with the admittedly beneficial operation of the Act (in affording real protection to purchasers without notice), and it is inconsistent with its leading principles. Those are, firstly, that a voluntary instrument shall be good as between the parties, for it gives the settlor the power of defeating his own gift at any subsequent time; and secondly, the rule that bonâ fide purchasers and they alone shall be protected from *fraud* and "*secret and covinous conveyances*," &c.; for a man cannot be said to be defrauded by a "secret" conveyance when he purchases willingly with full knowledge of it. Enables settlor to defeat his gift. "Secret" conveyance.

Again, the statute "was made against all fraud and deceit, and doth not help any purchaser who doth not come to the land for a good consideration, lawfully and without fraud and deceit" (*z*). In upholding the settlement in *Roe* v. *Mitton* (*a*), Wilmot, C.J., said: "Whether Purchase with notice is a fraud on the volunteers.

(*w*) *Clarke* v. *Willott*, L. R. 7 Ex. 313.
(*x*) See post, p. 266.
(*y*) *Clarke* v. *Willott*, L. R. 7 Ex. 317, 318; and see post, pp. 315 et seq.
(*z*) *Twyne's Case*, 3 Rep. 83 b. (*a*) 2 Wils. 358.

[*195] the purchaser for a valuable *consideration had notice of this settlement or not is not material (I think) in this case; but if he had notice I am clearly of opinion that the *purchase* is fraudulent." And so it is in every case: if a man has (perhaps in the discharge of a high moral duty in providing for his wife and children) made a voluntary settlement, how can a purchaser, knowing of that settlement, and combining with the settlor to defeat it, be represented as "without fraud and deceit?"

The rule condemned by judges.

Many opinions of judges are recorded condemning the doctrine; but as it has now stood ever since the Act was first passed (*b*), it is, as Lord Eldon observed (*c*), too late for any judge to dispute it; but the opinions of so many eminent judges (*d*) as to the injustice of the rule would seem to warrant the interposition of the legislature. "It must, I conceive, be assumed," said Sir W. Grant (*e*), "that the statute of the 27 Eliz. has received this construction: that a voluntary settlement, however free from actual fraud, is by the operation of that statute deemed fraudulent and void against a subsequent purchase for a valuable consideration, even when the purchase has been made with notice of the voluntary settlement. I have great difficulty to persuade myself that the words of the statute warranted, or that the purpose of it required, such a construction; for it is not easy to conceive how a purchaser can be defrauded by a settlement of which he has notice before he makes his purchase (*f*). But it is essential to the security of property that the rule should be adhered to when settled, whatever doubt there may be as to the grounds on which it originally stood."

Sir W. Grant.

Notice of deed on meritorious consideration.

It seems indeed to have been the rule at one time [*196] that a deed *on meritorious consideration (as

(*b*) A.D. 1585; *Gooch's Case*, 5 Rep. 60 (A.D. 1590).

(*c*) In *Pulvertoft* v. *Pulvertoft*, 18 Ves. 90.

(*d*) Of Lord Talbot and Chief Justice Wilmot, 2 Wils. 3rd ed. 358; Lord Thurlow in *Evelyn* v. *Templar*, 2 Bro. C. C. 148; Lord Ellenborough in *Doe* v. *Manning*, 9 East, 71; Chief Justice Cockburn in *Clarke* v. *Wright*, 6 H. & N. 870; Sir J. Mansfield, C.J., in *Doe* v. *Martyr*, 1 B. & P. N. R. 335; and of Lord Eldon and Sir W. Grant as mentioned in the text; *Brandlyn* v. *Ord*, 1 Atk. 571; *Rosher* v. *Williams*, L. R. 20 Eq. 218. But see 1 Fonbl. Eq. 271, and Rob. Fraud. Conv. 41.

(*e*) In *Buckle* v. *Mitchell*, 18 Ves. 110; and see *Trowell* v. *Shenton*, 8 Ch. D. 318.

(*f*) "Nemo enim videtur fraudare eos qui sciunt et consentiunt": Dig. lib. 42, tit. 8, par. 6, sec. 9.

a post-nuptial settlement on wife and children) would be good against a purchaser with notice, though not against one without notice, the wife and children not being regarded as mere volunteers (*g*).

Of no weight now.

This distinction, however, will not now be allowed, and it must be taken as definitely settled that, whether with or without notice, a conveyance in favour of relations, however honest and otherwise praiseworthy, or even a provision for a man's wife and children, however sacred in a moral point of view the duty of making such a provision may be, is bad against a future purchaser, as without consideration and voluntary (*h*).

Void against a purchaser with or without notice.

Collateral security.

But where the purchaser has taken a collateral security against the voluntary deed the question of notice seems to have been made one of importance (*i*).

American law as to notice.

In the New York statute (*k*), substantially re-enacting 27 Eliz. c. 4, there is a clause to the effect that "no such conveyance or charge shall be deemed fraudulent in favour of a subsequent purchaser who shall have actual or legal notice thereof at the time of his purchase, unless it shall appear that the grantee in such conveyance, or person to be benefited by such charge, was privy to the fraud intended." And it seems that throughout the United States, where the principles of the statute have been adopted (without in all cases any formal re-enactment), the same law prevails: that a purchaser cannot avoid a fair voluntary conveyance prior to his own and of which he had notice (*l*).

(*g*) 1 Eq. C. Ab. 354, pl. 4. In *Doe* v. *Routledge*, 2 Cowp. 712, Lord Mansfield says: "But in respect of voluntary family settlements, to be sure notice varies it much;" on the principle adopted by equity in construing 7 Anne, c. 20, under which, where a man knows of an unregistered deed his registered deed shall not set it aside.

(*h*) *Clarke* v. *Wright*, 6 H. & N. 870; *Dolphin* v. *Aylward*, L. R. 4 H. L. 486; *Trowell* v. *Shenton*, 8 Ch. D. 318.

(*i*) *Aldridge* v. *Duke*, Finch 439, where, however, the purchaser seems hardly to have been properly qualified; *Jennings* v. *Selleck*, 1 Vern. 467, though it is not certain that the settlement there *was* voluntary; and *White* v. *Stringer*, 2 Lev. 105, 2 P. Wms. 255, where, again, there was another point in favour of the volunteers—viz., that their interest was after a vested estate tail on valuable consideration: Sug. V. & P. 14th ed. 716. But see *Watkins* v. *Steevens*, Nels. 160, where the mortgage with notice and collateral security does not seem to have been questioned.

(*k*) N. York Rev. Stats. vol. 2, p. 134, chap. 7, tit. 1, sec. 2.

(*l*) See Kent, Com. 12th ed. vol. 4, 464, 465; Story, Eq. Jur. 12th ed. ss. 427, 428; ante, p. 2.

Conveyance for value within the statute if actually fraudulent.

[* 197] *A conveyance, whether voluntary or on valuable consideration, would no doubt be void against a subsequent purchaser for value if there was any actual fraud of which the first grantee had notice, so as to prevent him from claiming the exception of the 4th section (*m*) as to conveyances, &c., made upon or for good consideration and bonâ fide, without notice of any fraud or covin (*n*).

Conveyance for value when constructively fraudulent.

A conveyance for good consideration may, under some circumstances, be constructively fraudulent against a subsequent purchaser.

Perry Herrick v. *Attwood.*

Mortgagees giving up title deeds to facilitate raising money postponed.

In *Perry-Herrick* v. *Attwood* (*o*) A. voluntarily gave to his sisters a mortgage of real estate to secure an antecedent debt. The sisters allowed him to retain the title deeds that he might be enabled to give a first mortgage to secure another debt, for which he was being sued by B. A. deposited the deeds with B. to secure that debt, and afterwards, without B.'s concurrence, got possession of them and mortgaged the estate to the plaintiffs for a considerably larger sum, and delivered the title deeds to them, they having no notice of the mortgage to the sisters. Lord Cranworth held that the mortgage to the sisters must be postponed to that of the plaintiffs, for that the sisters having, with a view to A.'s raising a certain sum in priority to their mortgage, put it into his power to represent himself as unincumbered owner, could not, as against the plaintiffs, who advanced money on the faith of A.'s possession of the deeds, complain that A. had raised more than was agreed upon.

His Lordship said that it was not necessary that a conveyance should be voluntary to come within this statute. There was not a word in the statute about a [* 198] conveyance being voluntary; the *statute

(*m*) See ante, pp. 78 et seq., as to the similar clause in 13 Eliz. c. 5.

(*n*) See *Fermor's Case*, 3 Rep. 78 a, 80 a, Jenk. 254, pl. 45; *Alden* v. *Gregory*, 2 Eden, 280; *Gooch's Case*, 5 Rep. 60 a; *Burrel's Case*, 6 Rep. 71 b; and see *Mocatta* v. *Murgatroyd*, 1 P. Wms. 393; *Hobbs* v. *Norton*, 1 Vern. 136; *Hunsden* v. *Cheney*, 2 Vern. 150; *Raw* v. *Pote*, 2 Vern. 239; *Hewett* v. *Loosemore*, 9 Hare, 449; *Colyer* v. *Finch*, 5 H. L. C. 905; *Finch* v. *Shaw*, 19 Beav. 500, 511; and other cases, where a person standing by and suffering a purchaser to purchase land to which he himself had a claim, without disclosing his title, has been postponed to the purchaser. See Dart, V. & P. 5th ed. 841.

(*o*) 2 De G. & J. 21, see also *Lloyd* v. *Attwood*, 3 De G. & J. 614.

spoke only of conveyances made for the purpose of deceiving persons who should purchase the property, and of conveyances by the secret intent of the conveying parties to be to their own proper use (*p*). "If," his Lordship continued, "the intention of the parties to the transaction here in question was, that the Misses A." (the sisters) "should have this security, but that, nevertheless, Mr. A. should keep the title deeds that he might be enabled thereby to deal with the estate in favour of third parties, I am strongly disposed to think that the security comes within the statute; it certainly comes within its principle."

Clarke v. *Palmer.*

In the recent case of *Clarke* v. *Palmer* (*q*) the decision in *Perry-Herrick* v. *Attwood* (*r*) was considered and followed by Hall, V.C., who there pointed out that the benefit of postponement would enure to any subsequent mortgagee who had bonâ fide advanced his money under a mistaken belief as to the possession of the deeds.

Briggs v. *Jones.*

In *Briggs* v. *Jones* (*s*) a mortgagor of leaseholds obtained the lease from his mortgagee for the purpose of shewing it to J., a third person, to obtain money to pay off the mortgage. The mortgagee sent the lease, requesting that it might be returned in a few days, and that J. might be informed of his mortgage. But instead of doing this, the mortgagor deposited the lease with his bankers, who had no notice of the mortgage, as security for money advanced by them. It was held that the original mortgagee must be postponed to the bankers.

Cracknall v. *Janson.*

In *Cracknall* v. *Janson* (*t*) a secret mortgage was executed to secure a sum of money long previously advanced without any agreement for a mortgage, or any pressure from the lender. The deed was kept by the mortgagor, and the mortgagee did not know of its execution till after the execution of a subsequent mortgage for value. It was held that the secret mortgage was fraudulent and void as against the subsequent bonâ fide mortgage.

(*p*) See *Doe* v. *Routledge*, 2 Cowp, 705; *Cadogan* v. *Kennett*, 2 Cowp. 432.

(*q*) 21 Ch. D. 124. (*r*) 2 De G. & J. 21.

(*s*) L. R. 10 Eq. 92; and see *Hunter* v. *Walters*, L. R. 7 Ch. 75; *Waldy* v. *Gray*, L. R. 20 Eq. 228.

(*t*) 11 Ch. D. 1.

Where mortgagee not postponed.

[* 199] * But where (*u*) a mortgagee was induced, by a specious pretext, to allow the mortgagor to take the original lease for a short time, and he, by shewing the lease, induced another person to lend money on it, but the first mortgagee was not privy to this, and got the lease back, immediately, Lord Harcourt held that the first mortgagee should not be postponed.

Phipps v. *Endismore.*

Where (*v*) a tenant for life of certain lands, with power of jointuring, on his marriage settled them on trustees for securing his wife her jointure, and, on the same day, entered into a separate deed of covenant not to sell or incumber the lands, and that, if he did so, the trustees should receive the rents and profits, and apply them, as they might think fit, for the maintenance of A., or his wife, or children, or issue, the covenant and this proviso were held fraudulent and void against a subsequent incumbrance of A.'s life estate without notice.

Voluntary secret deed void against subsequent purchasers, though not fradulent.

Lord Lyndhurst, in affirming the decision of the Vice-Chancellor, said (*w*) the transaction could not be sustained. A. having a life interest in certain property, can it be contended that he can enter into a covenant—a private deed—with his own trustees that he shall not incumber his interest in the property, and that, if he does incumber it—if, for instance, he sells it for valuable consideration—the effect is to be that the purchaser shall not be entitled to possess what he has bought, but that A. himself, subject to the discretion of his trustees and under their direction, shall continue to enjoy the rents and profits as if the alienation had not taken place? In point of law it cannot be sustained, even in favour of the wife and children. Though admitted on all hands that no fraud was intended, the transaction is in its very nature fraudulent. Though the parties had no fraud in view the deeds themselves are fraudulent. If the tenant for life procured any person to advance money to him on the security of the property, in that event, and in that event only, was the instrument in question to have operation (*x*).

(*u*) *Peter* v. *Russell*, 1 Eq. Ca. Ab. 321, pl. 7.
(*v*) *Phipps* v. *Ennismore*, 4 Russ. 131.
(*w*) 4 Russ. 141; see ante, p. 198.
(*x*) See also *Webber* v. *Farmer*, 4 Bro. P. C. 170, where a perpetual injunction was granted against a somewhat similar defeasance being used in derogation of a marriage settlement on which it was a fraud.

* It has been made a question whether a [* 200] purchase by a man in the name and for the benefit of a child, or wife, or other person, either solely or jointly with himself, in such a "conveyance, gift, grant, charge, or limitation of uses," as can, if voluntary, be avoided by a subsequent purchaser for value from that man (*y*). Purchases in names of third persons, whether within the statute.

In *Barton* v. *Vanheythuysen* (*z*) the property in question was, by a deed reciting R. E. V. had contracted for the purchase of it, conveyed directly to trustees, upon trust to sell and stand possessed of the proceeds upon trusts for the benefit of the wife and children of V.; and it was argued that this conveyance did not vest any property in V., and that it was not a grant or settlement of real estate by him, so as to bring the case within the provisions of the statute 27 Eliz. c. 4. It was said that the purchase of an estate by a payment in the name of a child was not within the statute, and that V. did not in this case actually acquire the estate, but that it was in effect nothing more than giving the money to the wife and children, who by that means bought the estate. The learned judge who decided this case avoided this difficulty by shewing that V. had, by the recited agreement for purchase, acquired an equitable estate, which he then conveyed to the volunteers, and subsequently to the purchaser; but unfortunately did not give any opinion as to the question whether a purchase in the name of a third person is within the statute. *Barton* v. *Vanheythuysen.*

In an old case cited in Croke (*a*) a man purchased a manor in the name of his daughter, and afterwards kept courts and made leases in his own name and always took the profits, and then sold it to a purchaser, and the daughter never questioned it in the lifetime of her father; yet it was held that unless there be some fraud discovered it is not within the statute of 27 Eliz. c. 4, although there may be many badges of fraud. This has been cited as shewing that such purchases are not within the statute (*b*); but it was cited as above mentioned for the purpose of shewing that fraud is not to be presumed, and the most it can be taken to go to is, that such a purchase is not within the statute, unless *Lady Gorge's Case.*

(*y*) Sug. V. & P. 13th ed. 705, 715; *Drew* v. *Martin*, 2 H. & M. 130–133; Dart, V. & P., 5th ed. 937.
(*z*) 11 Hare, 126–129.
(*a*) *Lady Gorge's Case*, cited in *Crisp* v. *Pratt*, Cro. Car. 550.
(*b*) Sug. V. & P. 14th ed. 705; Dart, V. & P. 5th ed. 937.

[* 201] * *actually fraudulent.* It is hard to see how the purchase in that case could have been upheld; but, from the scanty report, it is impossible to know what were the reasons, or, indeed, whether the purchase for the daughter was voluntary as between her and her father, for it may have been made partly with her money. This seems to be the only decision in favour of the above proposition, and, under the circumstances, cannot be considered a satisfactory authority.

Question unlikely to arise.

The question can very seldom arise, for, if the title is investigated, the mode of purchase must apper on the face of it unless there is actual fraud; and it might be suggested that the principle on which *Barton* v. *Vanheythuysen* (*c*) was decided might be extended to every case of the sort, for every conveyance must, whether it is so recited or not, be founded on a previous agreement by the payer of the purchase-money, so that he would always convey to the volunteers an equitable interest. And apart from this, it might be said that if the purchaser buys in the names of children, or trustees for them, that is an advancement for them (*d*)—a gift, not of the purchase-money, but of the estate purchased, and therefore within the words of the statute. And again, if the purchase is for the benefit of a stranger, that is, not a child, then there is a resulting trust in favor of the real purchaser which he might have insisted on (*e*), and in this way also he might be said to have had an equitable title, which he conveyed to the volunteer.

But settlor always has an equitable interest which he conveys.

It cannot be doubted that such a conveyance, as much as any other, is within the mischief of the statute, and as it is to be liberally expounded, and objection so purely technical may be met by an answer equally technical.

Something of this sort seems to have been in Lord Hardwicke's mind when he said (*f*) a voluntary conveyance of an estate by one who sells it afterwards is fraud- [* 202] ulent, "and therefore, in this *Court, if a person, entitled to an estate to himself and his heirs, *takes a conveyance* of an estate so as to put a right in another,

(*c*) 11 Hare, 126.

(*d*) *Dyer* v. *Dyer*, 2 Cox, 92, 1 Wat. Cop. 216, 1 Wh. & Tu. L. C. 6th ed. 236; Sug. V. & P. 14th ed. 701.

(*e*) Ibid. and Sug. V. & P. 14th ed. 703.

(*f*) In *Underwood* v. *Hitchcox*, 1 Ves. 280. See also Gilb. Lex P. 272, where it is said, if a man purchases copyhold to himself, his wife, and daughters, a mortgagee would be entitled, ***notwithstanding the settlement.***

the Court will consider it fraudulent, upon which kind of equity the Court has gone."

Actual fraud.

In cases of *actual* fraud, it is conceived, the statute would undoubtedly apply to such purchases (*g*).

Lapse of time.

It seems that great lapse of time between the voluntary settlement and the sale to a purchaser will not of itself protect it against the claims of that purchaser (*h*); but, after purchasing, laches, or long acquiescence on his part after notice of the prior title, would, of course, bar his right to relief (*i*).

Estoppel.

Of course the doctrine of estoppel, which might prevail as between the voluntary grantor and the person who derives title under the voluntary conveyance, cannot bind those who claim from the former by a subsequent purchase for value, and consequently derive title under the statute itself (*k*).

Deed void under 27 Eliz. c. 4, may be a breach of covenant.

A conveyance in tail, though void under 27 Eliz. c. 4, has been held to be a breach of covenant not to assign for more than the covenantor's life (*l*).

All kinds of conveyances within the statute.

Every kind of instrument whereby a subsequent purchaser of the *land* is defrauded is within the meaning of this statute (*m*).

What *property* is included in 27 Eliz. c. 4.

The statute 27 Eliz. c. 4, applies only to *real* property and interests in *land*. By the 2nd section it is enacted that "All and every conveyance, grant, charge, lease, estate, incumbrance, and limitation of use or uses, of, in, or out of any *lands, tenements, or other hereditaments* whatsoever," made for the intent to defraud * those who "shall afterwards purchase in fee [* 203]

(*g*) *Lady Gorge's Case*, citen Cro. Car. 550; *Bullock* v. *Thorne*, F. Moo. 615–6; post, p. 214.

(*h*) *Alden* v. *Gregory*, 2 Ed. 280; *Willats* v. *Busby*, 12 L. J. Ch. 105, in which specific performance was granted to a purchaser avoiding a settlement made twenty-two years before. But see *Nunn* v. *Wilsmore*, 8. T. R. 521, 529; *Attorney-General* v. *Corporation of Newcastle*, 12 Cl. & F. 402; *Hoghton* v. *Hoghton*, 15 Beav. 316–7; *Parker* v. *Serjeant*, Finch, 146.

(*i*) *Hoghton* v. *Hoghton*, 15 Beav. 316–317; 3 & 4 Will. 4, c. 27, ss. 26, 27,

(*k*) *Cracknall* v. *Janson*, 11 Ch. D., per Fry, J., 11.

(*l*) *Gewen* v. *Roll*, Cro. Jac. 132.

(*m*) See *Phipps* v. *Ennismore*, 4 Russ. 131, where a private deed of covenant restraining alienation by a tenant for life was held void against a subsequent alienee of his life estate; supra.

simple, fee tail, for life, lives, or years, the same lands, tenements, or hereditaments, or any part or parcel thereof," &c., "or to defraud and deceive such as have or shall purchase any rent, profit, or commodity in or out of the same," shall be void against such subsequent purchasers.

All kinds of interest in *land*.

These general words are sufficient to include every kind of interest in *land*, whether legal or equitable (*n*), corporeal or incorporeal; and we accordingly find that chattels real or leaseholds (*o*), advowsons (*p*), and rent-charges (*q*), or annuities (*r*) issuing out of land, are within the statute.

Timber.

And it seems that timber is so also. In an old case (*s*) in trespass, defendant proved articles by which Sir R. H. (under whom the plaintiff claimed) sold 300 of the best trees in such a wood, to be taken between such a time and such a time. Sir R. H. died, and the purchaser, within the time, took the trees. The heir in tail of Sir R. H. brought trespass, and proved that his father was only tenant in tail, but this was a voluntary settlement of his own, and the judge held clearly that this sale, being proved to be for a valuable consideration, bound the heir, being within 27 Eliz. c. 4, and besides, the settlement was with a power of revocation.

Minerals.

And as the word "*land*" includes mines (*t*), a grant of minerals would probably be within the operation of the statute.

Extends to copyholders.

There was some doubt at one time as to copyholds. In *Doe* v. *Routledge* (*u*) Lord Mansfield expressed an opinion that they were included, and, wondering that the point had not been decided, thought it must have been taken for granted that they were; but it was not [* 204] until the comparatively recent case of * *Doe* v. *Bottriell* (*v*), followed and approved by the Master of the Rolls in *Currie* v. *Nind* (*w*), that it was settled that

(*n*) *Barton* v. *Vanheythuysen*, 11 Hare, 126, 134.
(*o*) Co. Lit. 3 b; *Burrel's Case*, 6 Rep. 72 a; et post, p. 238; *Oxley* v. *Lee*, 1 Atk. 624; *Price* v. *Jenkins*, 5 Ch. D. 619.
(*p*) *Hill* v. *Bishop of Exeter*, 2 Taunt. 69; et post, p. 220.
(*q*) *Garth* v. *Ersfield*, J. Bridg. 22, cited in 11 Hare, 132.
(*r*) *Poulton* v. *Wiseman*, Noy. 105.
(*s*) *Hatton* v. *Neal*, B. N. P. 90 a, S. C. ibid. 261 a; *Curson* v. *Blackall*, Toth. 257; 22 Vin. Abr. 21, tit. Vol. Conv. D. 2.
(*t*) Shep. Touch. 90; *Campbell* v. *Leach*, 2 Amb. 740, 748.
(*u*) 2 Cowp. 705. (*v*) 5 B. & Ad. 131, 136.
(*w*) 1 My. & Cr. 17; but see Bul. N. P. 108.

copyholds are within the "lands, tenements, and hereditaments" mentioned in the statute (*x*). This decision followed the general rule laid down in *Heydon's Case* (*y*), that "when an Act of Parliament is generally made for the good of the weal public, and no prejudice can accrue by reason of alteration of any interest, service, tenure, or custom of the manor, there many times copyhold and customary estates are within the general purview of such Acts."

Does not include *personal* property.

The statute does not apply to personal property, except chattels real (*z*). So an assignment of a sum of money charged on land and secured by a term for years is not within it (*a*).

A voluntary settlement of personal property is therefore good against a subsequent purchaser (*b*). For by the common law an estate made by fraud could be avoided only by him who had a *former* right, title, interest, debt, or demand (*c*); and consequently the purchaser, not having the protection of the statute, cannot have a better title than the settlor from whom he purchased (*d*).

Extends to the King.

This statute extends to conveyances to the sovereign (*e*); for though not in general bound by an Act of Parliament where not expressly mentioned, the King shall not be exempted by construction of law out of the general words of Acts made to suppress wrong, because he is the fountain of justice and common right, and the King, being God's lieutenant, cannot do a wrong (*f*). So if a person having a remainder after an estate tail grants his remainder to the King to prevent the tenant in tail from barring the entail, the grant to the King is void against * a purchaser from the tenant in [* 205] tail, for the Crown cannot be an instrument of fraud

(*x*) *Reyner* v. *Powel*, 2 Brownl. 79.
(*y*) 3 Rep. 7 a, 8 a; Co. Copyholder, 151.
(*z*) *Meek* v. *Kettlewell*, 1 Hare, 464, 473; *Bill* v. *Cureton*, 2 My. & K. 503, 512; *Barton* v. *Vanheythuysen*, 11 Hare, 126, 132; *Ashe* v. *Low*, 1 Law Rec. (N.S.) 145; see also *Kekewich* v. *Manning*, 1 D. M. & G. 176; ante, p. 203.
(*a*) *McClintock* v. *Ashe*, 2 Law Rec. (N.S.) 45.
(*b*) *Jones* v. *Croucher*, 1 S. & S. 315; *Sloane* v. *Cadogan*, Sug. V. & P. 7th, 8th, 9th, 10th, and 11th eds. app. No. 24.
(*c*) *Upton* v. *Bassett*, mentioned in *Twyne's Case*, 3 Rep. 83; Vin. Abr. vol. 13, p. 527.
(*d*) *Bill* v. *Cureton*, 2 My. & K. 512.
(*e*) *Magdalen College Case*, 11 Rep. 66 b, 74 a, b.
(*f*) *Magdalen College Case*, 11 Rep. 72 a.

and deceit: "Et cum sit author juris, non debet inde injuriarum nasci occasio, unde jura nascuntur" (*g*).

Reversion after estate tail.

It has been doubted whether a purchaser for valuable consideration can avoid a voluntary conveyance of a reversion in fee, it being, at the time of the conveyance, a dry reversion in fee expectant on an estate tail and of no value, being barrable by the tenant in tail with the consent of the tenant for life (*h*); but as the fraud is not complete in theory until the settled land is afterwards sold (*i*) it would seem clear on principle that such a settlement of the property when in reversion would be void against a person who purchased the fee after it had come into possession, and no one would be likely to purchase such an estate in reversion.

Voluntary conveyance to a *public* charity whether within the statue.

It has never been expressly decided whether a conveyance to a purchaser of lands previously given to a *public* charity (*k*) is or is not within the statute. There is certainly a difference between a voluntary conveyance to a *public* charity and a gift to a friend or relation; the idea of any benefit to the donor is precluded, and the presumption of fraud is rebutted by the nature of the gift.

East Grinstead's Case (*l*) is said to have decided (*m*) that such a voluntary gift is good against a purchaser without *express* notice of the charitable use; and it was there said that if a rent-charge be granted out of lands to a charitable use, and the land is afterwards sold for valuable consideration to one that had notice of the rent yet the rent remaineth, for that the purchase was of another thing that was not given to the charitable use (*n*).

But in Tothill (*o*) the same case (*p*) seems to be referred to shew that a purchaser coming without notice [* 206] of a rent-charge * shall not be chargeable therewith, although given to a charitable use (*q*). This is

(*g*) *Magdalen College Case*, 11 Rep. 74 a, b; see also *Wiseman's Case*, 2 Rep. 15; *Cholmley's Case*, 2 Rep. 51, 52; 2 Roll. Abr. 393; Sug. V. & P. 14th ed. 713; *Wiseman* v. *Barnard*, F. Moo. 195. See Hardcastle, Stat. 186, 188.

(*h*) *Buckley* v. *Arnold*, 2 Eq. C. Ab. 752; Vin. Abr. tit. Voluntary Conveyances, (*c*), ca. 10.

(*i*) See ante; p. 14.

(*k*) See stat. 43 Eliz. c. 4, s. 1.

(*l*) Duke (ed. 1676), 64.

(*m*) Pl. 5, Rob. Fraud. Con. 439.

(*n*) See post, p. 234.

(*o*) Ed. 1671, p. 258.

(*p*) As *Maynard* v. *Pauperes de East Greensted*.

(*q*) Duke, by Br. 638–9.

what was provided by the Statute of Charitable Uses (*r*), by which, moreover, the commissioners were empowered to "make decrees and orders for recompense to be made by any person who being put in trust or having notice of the charitable uses, shall break the same trust or defraud the same uses by any conveyance, gift, grant," &c. Statute of Charitable Uses.

A purchaser without notice from a purchaser with legal notice is said to be bound by the notice of his vendor (*s*); and a consideration of doubtful or inadequate worth, or a mixed consideration, as money and natural affection, or even the consideration of marriage, is not a sufficent consideration to avail against a charity, even without notice (*t*). Notice.

In *The Attorney-General* v. *Corporation of Newcastle* (*u*) a corporation voluntarily founded an hospital (*v*), and by their direction estates purchased by them were conveyed *direct from the vendor* to the hospital, but were subsequently managed by them. The corporation afterwards sold the property for valuable consideration, giving the purchasers an indemnity, and bought another estate with the purchase money and other moneys of their own, and accounted to the hospital yearly for more than the rental of the estate sold; it was held on appeal that the sale by the corporation was not valid against the charity (*u*). This, it will be seen, does not establish that a voluntary conveyance to a *public* charity may not be defeated by a subsequent sale (*w*) for value, and the question has since been spoken of as undecided (*x*). *Attorney-General* v. *Corporation of Newcastle.* Question unsettled.

Whatever favour may be allowed to such conveyances to charities can only attach to them as being *public* charities (*y*), and for the reason that such institutions are under certain restrictions, * to be supported [* 207] on grounds of public policy; and that a conveyance to them is of a public nature and irrevocable, precluding *Private* charities.

(*r*) 43 Eliz. c. 4, s. 6.
(*s*) Duke, 159; ibid. (by Bridg.) 638; Shelf. Mortm. 299.
(*t*) Duke, 177.
(*u*) 5 Beav. 307. S. C. 12 Cl. & F. 402.
(*v*) Under 39 Eliz. c. 5.
(*w*) Sug. V. & P. 14th ed. 719; and see Dart, V. & P. 5th ed. 892.
(*x*) *Trye* v. *Corporation of Gloucester*, 14 Beav. 173, 181–2.
(*y*) As to what are "charities," see 43 Eliz. c. 4; Duke, by Br. 568; 16 & 17 Vict. c. 137; 18 & 19 Vict. c. 124, s. 48; 23 & 24 Vict. c. 134, s. 8; *Williams* v. *Kershaw*, 5 Cl. & F. 111; *Attorney-General* v. *Eastlake*, 11 Hare, 205, 219–20; *Dolan* v. *MacDermot*, L. R. 3 Ch. 676.

any idea of benefit retained by the doner, or fraud intended against future purchasers.

Gifts to private charities or charities created under an Act of Parliament must therefore, it is conceived, in all cases be governed by the rules which are applied to ordinary voluntary conveyances (*z*).

Application of purchase-money when settlement set aside.

When a voluntary settlement is set aside under 27 Eliz. c. 4, an important question arises—namely, whether the purchase-money is to be paid to the vendor or to be handed over to the persons entitled under the voluntary settlement.

Formerly given to the volunteers. Where at least there was a covenant to that effect.

It has always been laid down that a voluntary settlement is good between the parties, although void against a purchaser; and it looks, at first sight, as if, in order to carry that principle to its full extent, the purchase-money ought to be applied in making good to the voluntary settlee what he loses by the land being taken from him. This seems to be what was done in the old case of *Leach* v. *Dene* (*a*), which is the only decision in favour of the volunteer, except *Ferrars* v. *Cherry* (*b*). The authority of this last case was expressly disputed by Lord Hardwicke (*c*), who said (*d*): "There is no instance where a voluntary conveyance, if afterwards defeated by sale for valuable consideration, that a satisfaction can be demanded against him or his estate, unless for some covenant on which an action or suit might be maintained." And on the strength of there being in that case what he considered such a covenant, he decreed the volunteers entitled to the purchase-money with interest.

But not so now.

But in *Evelyn* v. *Templar* (*e*), where there was a covenant by the settlor in a post-nuptial settlement much stronger than the common case—viz., that, if he did sell, the money to be raised by the sale should be paid to the trustees, and that he would settle the purchase-money to the same uses—Lord Thurlow decided [* 208] that *the purchaser was not affected by notice of this covenant in the voluntary settlement. In that

(*z*) See *Hinton* v. *Toye*, 1 Atk. 465.
(*a*) 1 Ch. Rep. 78. The decree is given in full in *Townend* v. *Toker*, L. R. 1 Ch, 461.
(*b*) 2 Vern. 383.
(*c*) In *Senhouse* v. *Earle*, Amb. 289.
(*d*) In *Williamson* v. *Codrington*, Ves. 516
(*e*) 2 Bro. C. C. 148.

case the volunteers filed a bill against the purchaser for misapplication of the purchase-money, which he had paid to the vendor, though with notice of the covenant; the bill was dismissed. It cannot, therefore, be said to overrule Lord Hardwicke's dictum quoted above; and yet, as Lord Eldon said (*f*): "Recollecting the struggle of late against the doctrine upon the construction of these statutes, it seems almost impossible to conceive that, if Courts of Equity had the jurisdiction of laying hold of the money, there would not have been found considerable authority leaving no doubt upon it at this day;" and it seems to be now settled that the Court has no such power (*g*).

In *Townend* v. *Toker* (*h*) Sir G. J. Turner, L.J., commenting on *Leach* v. *Dene* (*i*), said: "The latter cases are so much the other way, both in point of decision and of dicta, that we should not, in my opinion, be justified in acting in opposition to them. If they are not well founded, it is for the House of Lords, and not for us, to correct them."

Settlement wholly defeated by subsequent sale;

It may therefore be regarded as settled that a voluntary settlement is entirely defeated by the sale for valuable consideration of the *same* property; and is then nothing more than a piece of waste parchment (*k*). The whole thing is destroyed as soon as the property is sold; but the result is the same as if the voluntary conveyance had never been made (*l*), only if there is no covenant in the settlement binding on the settlor (*m*). The persons entitled under the voluntary settlement have no equity against the proceeds of sale.

but displaced only so far as necessary to give effect to mortgage or purchase.

It must, however, be borne in mind that the statute invalidates such settlement only to the extent of the interest of the mortgagee or purchaser. It leaves all those who were interested under the * volun- [* 209] tary settlement in exactly the same position in which they were originally placed when the settlement was executed, except that they are displaced to the extent

(*f*) In *Pulvertoft* v. *Pulvertoft*, 18 Ves. 91; and see *Buckle* v. *Mitchell*, 18 Ves. 100.

(*g*) *Daking* v. *Whimper*, 26 Beav. 568; *Townend* v. *Toker*, L. R. 1 Ch. 460, 461; *In re Walhampton Estate*, 26 Ch. D. 391.

(*h*) L. R. 1 Ch. 461.

(*i*) 1 Ch. Rep. 78.

(*k*) *Rosher* v. *Williams*, L. R. 20 Eq., per Malins, V. C., 218.

(*l*) *Daking* v. *Whimper*, 26 Beav. 568, 570; post, pt. vi. ch. i.

(*m*) *Williamson* v. *Codrington*, 1 Ves. 516.

to which the mortgage or purchase displaces them (*n*). So the parties interested under a voluntary settlement are entitled to a charge or lien on the settled property for any permanent improvements made by them during their possession (*o*).

Mortgagee cannot consolidate securities.

A mortgagee who has a charge on property the subject of a voluntary settlement, and also on other property, cannot consolidate his two securities so as to throw on the property the subject of the voluntary settlement any sum not originally charged thereon (*p*).

Where a voluntary settlement of freeholds, which the settlor subsequently mortgaged, contained a covenant for quiet enjoyment, it was held that the persons claiming under the mortgage were entitled to prove on the covenant against the settlor's estate (*q*).

Securities marshalled in favour of volunteer.

In the same case the subsequent mortgage comprised other lands besides those settled, and it was held that the volunteers might throw the mortgage primarily on the unsettled property (*r*).

Section 5: Powers of revocation, &c.

The 5th section (*s*) enacts that if any person or persons make any conveyance, gift, grant, demise, charge, limitation of use or uses, or assurance of any *lands, tenements, or hereditaments*, "with any clause, provision, article, or condition of revocation, determination, or alteration, at his or their will or pleasure, of such conveyance," &c., and afterwards "bargain, sell demise, grant, convey, or charge the same lands, tenements, or hereditaments, or any part or parcel thereof, to any person or persons, bodies politic or corporate, for money or other good consideration paid or given, the said first conveyance," &c., not by him or them revoked, &c., according to the power contained in the "said secret conveyance," &c., then the said former [*210] conveyance, &c., as touching those lands *shall be void, frustrate, and of none effect against the purchaser or any persons claiming under him.

(*n*) *Croker* v. *Martin*, 1 Bligh (N.S.) 573; *Dolphin* v. *Aylward*, L. R. 4 H. L. 499, 500, 504; *In re Walhampton Estate*, 26 Ch. D. 391.
(*o*) Story, Eq. Jur. 12th ed. vol. 2, ss. 1237, 1239; *Stepney* v. *Biddulph*, 13 W. R. 576; *Trevelyan* v. *White*, 1 Beav. 588.
(*p*) *In re Walhampton Estate*, 26 Ch. D. 391.
(*q*) *Hales* v. *Cox*, 1 N. R. 344.
(*r*) See, as to marshalling against volunteers, *Dolphin* v. *Aylward*, L. R. 4 H. L. 486, 500–1; et post, pt. vi. ch. i.
(*s*) 27 Eliz. c. 4; Appendix No. II.

Evidence.

It must be observed that the effect of the statute is to make the existence of a power of revocation "at his or their will or pleasure" *evidence* of an attempt to defraud a subsequent purchaser; and therefore that, where it is not limited in any respect, a subsequent purchaser upon a sale under the statute need not prove its execution unless he chooses to take under the settlement.

Power to be exercised at any time.

The power of revocation may be exerciseable at any time, or it may be only exerciseable at a future date, or within a fixed period.

In cases where the power can be exercised at any time, it has been decided that it makes no difference whether the first conveyance, containing a power of revocation, was for valuable (*t*) or meritorious consideration (*u*), or merely voluntary; the mere fact of the first conveyance containing a power of revocation is a fraud apparent within the statute (*v*).

Power to be exercised at a future date.

It was resolved in *Standen* v. *Bullock* (*w*) that where a man made a voluntary settlement with a power of revocation at a future time, as after such feast or after the death of such one, and afterwards before the power began sold the land for valuable consideration, this sale is within the remedy of the statute. For although the statute saith, "the said first conveyance not by him revoked," &c., which seems by the literal sense to be intended of a present power of revocation, for no revocation can be made by force of a future power until it comes in esse, yet it was held that the intent of the Act was, that such voluntary conveyance which was originally subject to a power of revocation should not stand against a purchaser bonâ fide for valuable consideration; and if other construction were made the said Act would serve for little or no purpose, and it would be no difficult matter to evade it.

* It is observable that in this case the first [* 211] settlement was voluntary, and it is submitted that if it

(*t*) *Buller* v. *Waterhouse*, Th. Jo. 94, 3 Keb. 751; *Hungerford* v. *Earle*, Freem. Ch. 120.

(*u*) *Cross* v. *Faustenditch*, Cro. Jac. 180.

(*v*) *Tyre* v. *Lyttleton*, 2 Brownl. 187, 190.

(*w*) 3 Rep. 82 b; see infra, p. 214, where a translation of this case, reported as *Bullock* v. *Thorne* in F. Moo. 614, is given in full; *Garth* v. *Ersfield*, J. Bridg. 23; case of *St. Saviour's, Southwark*, Lane, 22.

had been supported by a valuable consideration it would have been good against the subsequent purchaser until the event happened and the power of revocation came into force (*x*).

If the power can only be exercised within a fixed period, a settlement made after that period cannot on that account be set aside as fraudulent.

Extinguishing power of revocation.

It was also resolved in *Standen* v. *Bullock* (*y*) that if a man, having a power of revocation, by a conveyance to a stranger extinguishes his power, with intent to defraud a purchaser, and then sells the land for valuable consideration, the purchaser shall enjoy the land; for as to him the conveyance by which the condition was extinct was void by the said Act.

This principle must of course be confined to cases where the settlement was voluntary and the extinguishment of the power was fraudulent or voluntary; for if such settlement and extinguishment were bonâ fide, and not voluntary, it would be good against the subsequent purchaser (*z*); and this is shewn by the next passage in Coke, that "The first clause of the Act, by which all fraudulent and covinous conveyances are made void as to purchasers, extends to the clause referring to powers of revocation."

This, it is submitted, will also be the case if the settlement be for value, but the extinguishment of the power a voluntary one of which the purchaser had notice.

Power to revoke with assent.

It was also said in *Twyne's Case* (*a*) that if A. had reserved to himself a power of revocation *with the assent* of B., and afterwards A. bargained and sold the land to another, this bargain and sale is good and within the remedy of the said Act, for otherwise the good provision of the Act, by a small addition and evil intention, would be defeated.

The statute, however, only speaks of powers of rev-

(*x*) 3 Rep. 82 b; Sug. V. & P. 14th ed. 722; Dart, V. & P. 5th ed. 903.
(*y*) 3 Rep. 83 a.
(*z*) See *Leigh* v. *Winter*, infra, where the power of revocation was limited by a subsequent agreement.
(*a*) 3 Rep. 82 b.

ocation "at his or their will or pleasure," so that where the power is * exercisable with the consent of [* 212] trustees of the grantor's own voluntary nomination, or on a payment of a trifling sum to a third person (*b*), so as to put it in his power to defeat the whole settlement at will, the Act applies (*c*); whereas, if the power of revocation is subject to the bonâ fide consent of a third person or persons it is different (*d*).

Leigh v. *Winter*.

Thus, in the old case of *Leigh* v. *Winter* (*e*), Sir F. Leigh conveyed certain manors and tenements to the use of himself for life, remainder to his son W. Leigh, in tail, with a proviso of revocation if his son should marry without his consent. Afterwards by an indenture made between him and the grandmother of the said W. Leigh by his mother's side, reciting this proviso and certain considerations given to Sir F. Leigh, it was agreed that Sir F. Leigh should not exercise his power of revocation "without the licence and consent of the Lord Coventrie, Lord Keeper, first had in writing;" and it was held that this consideration was binding and restrained the power from being exercised without that consent.

Banbury's Case.

So where (*f*) Lord Banbury made a voluntary lease for ninety-nine years, in trust for raising £6000 for his children, with a power to revoke it with the consent of his lady and three more of her friends, this difference was pointed out on the statute 27 Eliz. c. 4: that if a man reserves such a power with the consent of his own relation, or one that may be supposed to be at his command, it will be fraudulent; but if it be with the consent of others, as here it was of the wife's friends, who cannot be supposed to consent but on very good grounds, there it will not be fraudulent.

Power only to be exercised by will.

The power of revocation may also be exerciseable only by will, in which case the settlement will be void only from the date of the settlor's death as against a subsequent purchaser (*g*).

A power enabling the settlors to revoke the uses of a

(*b*) *Griffin* v. *Stanhope*, Cro. Jac. 454.
(*c*) *Lavender* v. *Blakstone*, 2 Lev. 146.
(*d*) See *Lord Banbury's Case*, infra, and *Buller* v. *Waterhouse*, 3 Keb. 751.
(*e*) W. Jo. 411. (*f*) *Lord Banbury's Case*, Freem. Ch. 8, 9.
(*g*) Chance Powers, vol. 2, 167; *Adney* v. *Field*, Amb. 654.

Power to sell and purchase other lands on same trusts.

settlement, and the trustees to sell the estate and convey it to a purchaser so * as the purchase-money should be paid to the trustees and not the settlors, and invested in the purchase of other lands to be settled to the same uses, is not a power of revocation within the statute. So in such a case it was held that a revocation by the settlors, and a conveyance by them and the trustees to a purchaser who paid the money to the settlors and not the trustees, the money not being laid out in the purchase of other lands, was not a revocation under the settlement nor such a sale as would avoid the settlement, which was in consideration of marriage (*h*). And so, also, a grant of an annuity with a power of revocation, provided another annuity as good was settled, has been held not within the statute; it was said by Lord Hobart, that if it were a power to revoke on the payment of £20 only, it would be good (*i*).

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Revocation on payment of trifling sum.

The last proposition, however, is opposed to the authority of *Griffin* v. *Stanhope* (*k*), where the Court held a condition in a lease, that it should be void on a jointure being made, was not a power of revocation within the statute, and took this difference: that where leases are made with a proviso "that if the lessor pay 10*s.* that then the lease shall be void," such lease shall be void as to the purchaser, because it is apparent that the sum to be paid is not of the value of the land; but the payment must be a fair equivalent, and then it will stand against a purchaser.

Only a "purchaser" can avoid;

Even a settlement with an express power of revocation cannot be avoided except by a person properly qualified under the statute (*l*); but a revocable deed has been held void against a subsequent judgment creditor (*m*).

and only so far as necessary.

Even a voluntary deed, with power of revocation, is only void against a subsequent purchaser so far as it breaks in upon his rights, so that a subsequent lease to another person (*n*), or a mortgage, is only a revocation pro tanto (*o*).

(*h*) *Doe* d. *Willis* v. *Martin*, 4 T. R. 39.
(*i*) *Lord Banbury's Case*, Freem. Ch. 8. 9.
(*k*) Cro. Jac. 454.
(*l*) *Parker* v. *Serjeant*, Finch, 146, 148; post, pp. 217 et seq.
(*m*) *Garth* v. *Ersfield*, J. Bridg. 22; *Tarback* v. *Marbury*, 2 Vern. 510, 1 Eq. Ca. Ab. 148; but see post, pp. 224 et seq.; and *Beavan* v. *Earl of Oxford*, 6 D. M. & G. 492.
(*n*) *Coke* v. *Bullock*, Cro. Jac. 49.
(*o*) *Perkins* v. *Walker*, 1 Vern. 97; *Thorne* v. *Thorne*, 1 Vern. 141.

But it seems to have been decided in an old [214] case (*p*) that where land was conveyed voluntarily with power of revocation, and then sold to a purchaser for value, subject to a condition (which being afterwards broken the purchaser's interest ceased), the interest of the volunteers was not restored after the purchaser's interest had ceased by the condition being broken.

A power to charge a sum certain is not a power of revocation within the statute (*q*); but a power to mortgage to any extent would doubtless be so considered (*r*), and a power to lease for any term has been held to be a power of revocation at will (*s*).

Bullock v. *Thorne*.

It may be useful to give here a statement of the old case of *Bullock* v. *Thorne* (*t*), in which many points on this subject were discussed.

T. B., being seised in fee or fee tail in 28 Eliz., bargained and sold and suffered a common recovery, the uses being declared by deed to use of himself for life, remainder to A. and B. (the lessors of the plaintiffs) for ten years, the remainder to T. B. in tail male, with a power of revocation at the will of T. B. by a declaration to be made by him in the presence of six witnesses, whereupon the recovery previously suffered should enure to the use of T. B. in fee; in 31 Eliz., T. B. sold the land to E. Standen, in fee, for £4000.

In 36 Eliz., T. B. died, and A. B. entered and made a lease to the plaintiffs, who brought ejectment against the defendant, claiming under Standen, the purchaser. The question was, whether the first conveyance, with power of revocation, was void against Standen. It was objected by the plaintiffs, first, that the first and second conveyances were made by different persons, but this was overruled as a mere technical objection (*u*); and the second objection was (T. B. having, between the dates of the first recovery and the sale, made a lease of part of the lands and levied a fine), that by this lease the power of revocation was *suspended, and [* 215]

Power suspended by lease.

(*p*) *Dame Ever's Case*, 2 Roll. Rep. 34-5.
(*q*) *Jenkins* v. *Keymis*, 1 Lev. 150, Hard. 395.
(*r*) See *Tarback* v. *Marbury*, 2 Vern. 511; which, however, was a decision on the 13 Eliz. c. 5.
(*s*) *Lavender* v. *Blakstone*, 2 Lev. 146.
(*t*) F. Moo. 615.
(*u*) See post, p. 242.

by the fine quite extinct, and that as he *could* not have exercised it then, it was not within the statute.

But the whole Court held this contrary to the words and intention of the Act—to the words mentioning, first a conveyance, &c., with power of revocation; secondly, a sale for money, &c.; and thirdly, such conveyance, not being revoked according to the power, should be void. The Court said: The which words agree with the case in question in all three things: the one, that here is a conveyance with power of revocation mentioned in the deed; the second, that the conveyance is not revoked according to the power; the third, that he who made the conveyance had bargained and sold the land afterwards to another for money; and therefore, according to the letter of the statute, the case in question, which had all the positions within the statute, ought also to have the conclusion of the statute, i. e., that the conveyance was void against the purchaser. The intent of this statute is to be expounded against fraud and to suppress fraud, and to maintain just dealing.

It would be a fraud for T. B. to take £4000 of a purchaser, and yet that the purchaser should lose the land through a former conveyance voluntarily made by T. B. for the advancement of his name and issue, and the which, by the agreement expressed in the deed, ought to be revoked by T. B. himself; wherefore to maintain that conveyance is against the intent of the statute. And they also thought that the extinguishment of the power of revocation after the sale will not alter the operation of the statute; because when the power is determined then it is impossible that the conveyance should be revoked according to the power, and if it cannot be, then the statute makes the conveyance void against the purchaser; for it says, if any one make conveyance with power of revocation, &c., the conveyance shall be void; and to construe the statute that the conveyance would be good against the purchaser if the power of revocation was determined before the purchase, would be to make nourishment and not suppression for fraud. Because then the vendor could make a secret release of the powers, or secret feoffment, of which the purchaser could not have notice, and yet he would be able to shew [* 216] to the *purchaser the conveyance, mentioning the power of revocation by which he is encouraged to buy the land, and will be deceived of the land and money both by that secret release or feoffment, which is against

all equity and reason; and therefore they all thought that if the power of revocation is mentioned in the deed of conveyance, let it be determined or not by that mesne act, yet the conveyance will be void against the purchaser. Walmesley, J., was clearly of opinion that a lease for years made by one who had power of revocation does not suspend the power if it were created by a use, but that he could revoke, subject to the lease; aliter as to a condition annexed to an estate in possession. Wherefore he said that in the principal case the lease is no impediment, but that T. B. could have revoked as to the reversion, and cited a case adjudged in the King's Bench, temp. Wray, C. J., that where one makes a conveyance with power (by way of use) to revoke after a day to come, and before the day conveys to a purchaser, that conveyance is void against the purchaser, and yet at the time of the purchase the vendor could not have revoked; but the reason was, that in the former conveyance there was a power of revocation *mentioned*, and it was not revoked according to the power, and the statute is to be intended against fraud to the maintaining of purchases; but there the conveyance will not be void against the purchaser before the time limited, but after that time it shall be wholly void, because subject to revocation at that time by express agreement. And they also all agreed that if a person had a power of revocation entire, as in the principal case, and extinguished or suspended the power in part, he could revoke for the residue if it were by way of use; not so of a condition annexed to the land. And they further agreed that the granting of a lease, though confined by fine levied, only suspends a power to revoke a use during the term, and does not extinguish it.

*CHAPTER II.

WHAT PERSONS ARE ENTITLED TO RELIEF AS PURCHASERS WITHIN 27 ELIZ. C. 4.

27 Eliz. c. 4, makes void conveyances to deceive subsequent purchasers of the same lands.

The statute 27 Eliz. c. 4, s. 2, declares "That all and every conveyance, grant, charge, &c., had or made for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as have *purchased* or shall afterwards *purchase*, in fee simple, fee tail for life, lives, or years, the same lands, tenements, and hereditaments, or any part or parcel thereof so formerly conveyed, or to defraud and deceive such as have or shall purchase any rent, profit, or commodity in or out of the same or any part thereof, shall be deemed and taken only *as against that person*, &c., his and their heirs, &c., and against all and every other person and persons lawfully having or claiming by, from, or under them or any of them which have purchased, or shall hereafter so purchase for money or other good consideration, the same lands, &c., to be utterly void, frustrate, and of none effect, any pretence, colour, feigned consideration, or expressing of any use or uses to the contrary notwithstanding."

The word "purchase," as used in the statute, of course refers to cases of selling and purchasing in the ordinary and vulgar acceptation of the word, and not in the technical sense of any person who obtains land otherwise than by descent (*v*).

Who are entitled to the benefit of the statue. How to be qualified.

The statute refers only to purchasers for money or other good consideration; the question of indebtedness or not is immaterial (*w*); in order to acquire a right to the protection of the statute the purchaser must be qualified in a certain way. Although, if there is any valuable consideration for a settlement, the quantum [*218] of such a consideration is of no consequence *under the statute (*x*) so long as there is anything in the

(*v*) See *Ex parte Hillman*, 10 Ch. D. 625.
(*w*) *Lord Townsend* v. *Windham*, 2 Ves. 10, ante, pp. 37 et seq.
(*x*) *Price* v. *Jenkins*, 5 Ch. D. 621.

shape of consideration which can be called value (*y*); still it does not follow because a man has paid a sum of money, however small, for an estate, or for the chance of being able to get it from the prior volunteer, that he is therefore a purchaser.

Upton v. *Bassett*.

In *Upton* v. *Basset* (*z*) "it was resolved that no purchaser should avoid a precedent conveyance made by fraud and covin but he who is a purchaser for money or other valuable consideration." Consideration of blood, natural affection, or the like, will not do (*a*); and it was also agreed (*b*) that the statute would not help a purchaser unless he came to the land, not only on valuable consideration, but also "lawfully and without fraud or deceit." The principle thus laid down has been ever since adhered to, and it seems that in order to entitle a man to the privileges of "a purchaser" under this statute the price he paid must not be so inadequate as to induce the belief that the sale was not bonâ fide, but was a mere contrivance to get rid of the first settlement and make another, which was, in truth, also voluntary; for if it is merely colourable it will not stand (*c*).

He must be a purchaser for valuable consideration.

Lawfully and bonâ fide.

Colourable purchase no good.

Purchase-money or mortgage-money must be really paid.

If it is shewn that the consideration stated to have been paid was not really and bonâ fide paid, or was afterwards returned, such a sale will not be allowed to override a prior conveyance, although voluntary (*d*). But the vendor's giving back part of the purchase-money to the purchaser's family does not invalidate the sale, for that might have been altered (*e*). So where the estate is conveyed as security for money to be then afterwards advanced, it must be proved that money has actually been advanced on the mortgage (*f*); and evi-

(*y*) *Bayspoole* v. *Collins*, L. R. 6 Ch. 232; *In re Foster and Lister*, 6 Ch. D. 89.

(*z*) 3 Rep. 83 a; ante, p. 188.

(*a*) 3 Rep. 83 a; *Dame Burg's Case*, F. Moo. 602, 603; *Lessee of Bonny* v. *Griffith*, Hayes, 115.

(*b*) In *Nedham* v. *Beaumont*, cited 3 Rep. 83 b.

(*c*) *Doe* v. *Routledge*, 2 Cowp. 705, 712; et ante, p. 189; *Bullock* v. *Sadlier*, Amb. 764; *Doe* v. *James*, 16 East, 212; *Hill* v. *Bishop of Exeter*, 2 Taunt. 69; *Doe* v. *Rowe*, 4 Bing. N. C. 737; *Persse* v. *Persse*, 7 Cl. & F. 321; *Metcalfe* v. *Pulvertoft*, 1 Ves. & B. 180, 184; *Doe* v. *Manning*, 9 East, 59; *Doe* v. *Martyr*, 1 B. & P. N. R. 332; *Dolphin* v. *Aylward*, L. R. 4 H. L. 486, 499; *Rosher* v. *Williams*, L. R. 20 Eq. 218.

(*d*) *Humphreys* v. *Pensam*, 1 My. & Cr. 580; *Roberts* v. *Williams*, 4 Hare, 130.

(*e*) Per Lord Ellenborough, in *Doe* v. *James*, 16 East, 214.

(*f*) *Doe* v. *Webber*, 1 Ad. & E. 733, 740.

[* 219] dence of this cannot be given by * the mortgagor after he has executed the voluntary settlement, for he cannot derogate from the estate he has conveyed (*g*).

So if the valuable consideration be not expressed in the deed, evidence is admissible to shew that there was consideration, though not appearing on the face of the deed (*h*); but such evidence must be to the utmost extent satisfactory and conclusive (*i*).

On the other hand, a settlement, though voluntary on the face of it and and at first void against a purchaser for value, may yet become valid by force of subsequent events (*k*).

A purchaser in the sense in which the word is used in this statute is one who gives money or other valuable consideration in order to have the land (*l*).

Mortgagee. There is, of course, no doubt that a mortgagee is a purchaser pro tanto within this statute (*m*), but a mortgage to secure moneys to be then afterwards advanced must be supported by proof of an actual advance to the mortgagor, whose subsequent admission will not suffice (*n*). As a purchaser has in equity the same rights under this statute as at law (*o*), a purchaser of an equitable estate (*p*), or a person who has, by a contract to purchase, acquired an equitable estate (*q*), or an equitable mortgagee, by deposit of title deeds (*r*), is a purchaser. An equitable mortgagee may in equity establish his title by means of parol evidence, or written documents coupled with parol evidence (*s*); but he

Purchaser of equitable estate.

Equitable mortgagee.

(*g*) *Doe* v. *Webber*, 1 Ad. & E. 733; and see *Lalor* v. *Lalor*, 4 L. R. Ir. 351, S. C. 678.

(*h*) *Townend* v. *Toker*, L. R. 1 Ch. 459.

(*i*) *Levy* v. *Creighton*, 22 W. R. 605.

(*k*) *Clarke* v. *Willott*, L. R. 7 Ex. 313; *Judd* v. *Green*, 45 L. J. (N.S.) Ch. 108; post, pp. 314 et seq.

(*l*) *Beavan* v. *The Earl of Oxford*, 6 De G. M. & G. at p. 517.

(*m*) *Rand* v. *Cartwright*, 1 Ch. Ca. 59; *Cormick* v. *Trapaud*, 6 Dow, 60; *Senhouse* v. *Earle*, Amb. 289; *Doe* v. *Webber*, 1 Ad. & E. 733, *Dolphin* v. *Aylward*, L. R. 4 H. L. 486, 499, 504; *Cracknall* v. *Janson*, 11 Ch. D. 1.

(*n*) *Doe* v. *Webber*, 1 Ad. & E. 733; *Myers* v. *Duke of Leinster*, 7 Ir. Eq. 159.

(*o*) *Smith* v. *Garland*, 2 Mer. 123, 127.

(*p*) *Buckle* v. *Mitchell*, 18 Ves. 100; ante, p. 193.

(*q*) *Barton* v. *Vanheythuysen*, 11 Hare, 126, 130. But see *Holford* v. *Holford*, 1 Ch. Ca. 217.

(*r*) *Lister* v. *Turner*, 5 Hare, 281; *Briggs* v. *Jones*, L. R. 10 Eq. 92.

(*s*) *Ede* v. *Knowles*, 2 Y. & C. Ch. 172.

cannot, of course, be regarded as a purchaser in an action *at law, though trover can be maintained [* 220] for the deeds (*t*); and, of course, a person who purchases in trust for, and with the money of, another person is a purchaser (*u*).

Not at law. Trover. Purchase with money of and in trust for other person.

In *Shaw* v. *Standish* (*v*) the Court inclined to think that an agreement by certain persons with the owner of land to enter into partnership with him, and to dig and work mines, and to bear profit and loss in certain proportions, constituted them purchasers of their interest in the land under the agreement as against a prior voluntary settlement; but eventually a decree was made by consent establishing the articles of co-partnership.

Mining agreement.

It is not necessary under the statute that any *money* should be paid to make a man a purchaser; the bonâ fide release of an adverse claim to a litigated estate without any money payment is a purchase. "There can be no doubt," said Sir J. Mansfield in *Hill* v. *Bishop of Exeter* (*w*), "in general, that the giving up a right without fraud is a valuable consideration. The re-lessor parts with that for which the other may very reasonably give money." That case was thus: A. was owner in fee of an advowson, except the next presentation, which belonged to B. under the same title. A. made a voluntary conveyance of his interest, and on the next vacancy C. claimed the whole advowson by an adverse title, and by way of compromise C. released his rights to A. and B. according to their respective interests (so that A. had the advowson in fee, except the presentation on the then vacancy, which B. had), and then, in consideration of this, A. conveyed the *then next* presentation to C.; and it was held that this was a sale for value, and paramount to A.'s prior voluntary gift.

Release of adverse claims a purchase.

A lessee at a rack rent (*x*), with fine or premium paid (*y*), or to secure a sum of money, is a purchaser within the statute (*z*), but not a lessee without fine or

Lessees, &c. purchasers.

(*t*) *Kerrison* v. *Dorrien*, 9 Bing. 76.
(*u*) *Poulton* v. *Wiseman*, Noy, 105; and see *Watkins* v. *Steevens*, Nels. 160; *Doe* v. *Lewis*, 11 C. B. 1035.
(*v*) 2 Vern. 326. (*w*) 2 Taunt. 69.
(*x*) *Goodright* v. *Moses*, 2 W. Bl. 1019; *Ashton* v. *Bretland*, 9 Mod. 59; *Shaw* v. *Standish*, 2 Vern. 327.
(*y*) *Cross* v. *Faustenditch*, Cro. Jac. 180; and *Hinde* v. *Collins*, there cited, p. 181.
(*z*) *Naylor* v. *Baldwin*, 1 Ch. Rep. 69.

rent (*a*). Lessees are, in fact, within the very words [* 221] of the statute, which mentions purchases *"for

Surety.

live, lives, or years." It seems that a *surety* to whom a lease or conveyance of land has been made as a security and indemnity to him is a purchaser (*b*), for indemnity is a valuable consideration (*c*).

Assignee of lease.

The assignee of a lease is a purchaser within the statute (*d*).

Price v. *Jenkins.*

This point seems involved in the decision in *Price* v. *Jenkins* (*e*), for, if an assignment of a lease is always for value under the statute, an assignee of a lease must be a purchaser within it. In that case leaseholds were assigned by A. to trustees upon certain trusts after payment of out-goings. The assignment contained no covenant by the trustees to pay the rent or to perform the covenants of the lease. A. afterwards contracted to sell them to the plaintiff. It was held by the Court of Appeal that the assignment of leaseholds was for value, and must prevail against the subsequent sale, because the trustees came under a responsibility for payment of rent and performance of the covenants of the lease; it might be such a responsibility that a lessee might be actually willing to pay money to get rid of. This was followed in *Ex parte Doble* (*f*) by Bacon, V.C., who laid down the principle that, if no fraud be proved, the assignment of a lease is always for value, whether it contains a covenant for assignment or not. In *In re Ridler* (*g*), however, the effect of the decision in *Price* v. *Jenkins* (*e*) seems to have been narrowed. Cotton, L.J., there pointed out that *Price* v. *Jenkins* (*e*) really only decided that the grantee's undertaking the liability for rent was sufficient to support a settlement, under 27 Eliz. c. 4, which was open to no other objection but that of being voluntary.

Settlements or other instruments which are voluntary in their creation may, under certain circumstances,

(*a*) *Upton* v. *Basset*, Cro. Eliz. 444.
(*b*) *Scot* v. *Bell*, 2 Lev. 70; see also *Beverley* v. *Gatacre*, 2 Roll. 305; *White* v. *Thornborough*, Prec. Ch. 425.
(*c*) *Worsley* v. *Demattos*, 1 Burr. 467, 474, 482.
(*d*) *Colville* v. *Parker*, Cro. Jac. 158.
(*e*) 5 Ch. D. 619.
(*f*) 26 W. R. 407; see comments of Hall, V.C., in *Trowell* v. *Shenton*, 8 Ch. D. 321.
(*g*) 22 Ch. D. 82; and see post, p. 258.

become valuable by subsequent transactions; as where a marriage is contracted on the faith of a provision for the husband or wife, secured by what was, at the time of its execution, a voluntary settlement (*h*); or *where a voluntary grantee sells to a bonâ [* 222] fide purchaser (*i*). It can hardly, however, be argued that this principle can be applied so as to make the grantees purchasers within the meaning of the statute, and to avoid a prior voluntary deed; for if a man makes a voluntary settlement, and afterwards another voluntary settlement of the same land, no subsequent considerations can make the second prevail against the first (*k*). The reason of this is that when the settlor made the second settlement he had *no estate* or interest in the property which he could convey to a volunteer, but only to a purchaser (*l*), and ex post facto considerations can only make good that which was merely voidable, and never that which was simply void, in its creation (*m*).

Persons interested under voluntary settlement to which ex post facto considerations attach, not purchasers.

The consideration of marriage is sufficient, as we have seen, to prevent a conveyance from being voluntary under the statute, and it also is sufficient to make void a prior voluntary or fraudulent deed (*n*).

Marriage consideration qualifies as purchaser.

So where (*o*) J. W. made a post-nuptial settlement of land on himself for life, remainder to his first and other sons in tail, and then his wife died without issue, and he, before his second marriage, settled the same land on his intended wife for her jointure, and died, leaving her and one son by her him surviving, it was held that she was entitled to the lands for her jointure in preference to her son, who claimed as tenant in tail under the first settlement; and "the Court declared the marriage was a good consideration to make the feme a purchaser," and decreed the first settlement to be set aside.

Douglasse v. *Ward*.

Jointress purchaser.

(*h*) *Prodgers* v. *Langham*, 1 Sid. 133; ante, p. 219; post, pp. 316. 318.

(*i*) *George* v. *Milbanke*, 9 Ves. 190; post, p. 322.

(*k*) *Clavering* v. *Clavering*, 2 Vern. 473.

(*l*) *Doe* v. *Rusham*, 17 Q. B. 724; post, p. 326. But see *Beatson* v. *Beatson*, 12 Sim. 281.

(*m*) See *Scott* v. *Scott*, 4 H. L. C. 1065.

(*n*) *Watkins* v. *Steevens*, Nels. 160; *Douglasse* v. *Ward*, 1 Ch. Ca. 99; *Mathews* v. *Jones*, 2 Anst. 516; *Reeve's Case*, 2 Vent. 363; *Parker* v. *Serjeant*, Finch, 146, 148; post, p. 235; *Croker* v. *Martin*, 1 Bli. N. R. 573, 588; Sug. L. of P. 148; *Doe* v. *Lewis*, 11 C. B. 1035, 1057; but see *Allen* v. *Arme*, 1 Vern. 365.

(*o*) *Douglasse* v. *Ward*, ubi sup.

Husband purchaser by conveyance to him in fee.

The husband is equally a purchaser of his interest where the conveyance in consideration of marriage is [* 223] to him in fee (*p*); and *where the settlement is on the wife and children the children are purchasers equally with the wife (*q*); for the consideration runs through all the limitations to husband, wife, and issue (*r*). In cases like *Kekewich* v. *Manning* (*s*), where there was a settlement on a second marriage of the same property that had been settled on the first marriage and the only claimants under the first marriage were collaterals, the voluntary limitations in the first settlement would, if the property were an interest in land (which there it was not), be void as against the second.

Children purchasers.

Kekewich v. *Manning.*

Husband was not purchaser of what came jure mariti.

It is different where a husband obtained an estate by the marriage, not by virtue of any settlement, but merely by the marriage itself; for it seems that a husband was not a purchaser of that which came to him jure mariti (*t*). In such a case, it is conceived, the avoidance of a prior settlement would have been a fraud on marital rights rather than a conveyance avoided by the 27 Eliz. c. 4 (*u*).

By the Married Women's Property Act, 1882 (*v*), this marital right of the husband has been destroyed; so that any man who marries after 1882 acquires no estate whatever by virtue of marriage itself (*w*).

Cestui que trust under post-nuptial settlement, when a purchaser.

Of course, a person claiming under a post-nuptial settlement is not a purchaser within the statute (*x*) on account of the consideration of marriage; and a settlement on the re-celebration in England of a Scotch marriage is voluntary (*y*). But a post-nuptial settlement in pursuance of an ante-nuptial agreement in writ-

(*p*) *O'Gorman* v. *Comyn*, 2 Sch. & Lef. 147–8.

(*q*) *Carpenter* v. *Carpenter*, 1 Vern. 440; *Rancliffe* v. *Parkyns*, 6 Dow. 149, 209; post, p. 336.

(*r*) *Nairn* v. *Prowse*, 6 Ves. 752; post, p. 341.

(*s*) 1 D. M. & G. 176.

(*t*) *Doe* d. *Richards* v. *Lewis*, 11 C. B. 1035–1057; *Collins* v. *Burton*, 5 Jur. (N.S.) 952, S. C., reversed on other points, 4 D. G. & J. 612. But see *Lance* v. *Norman*, 2 Rep. Ch. [79] 41.

(*u*) See *Lance* v. *Norman*, 2 Rep. Ch. [79] 41; *Strathmore* v. *Bowes*, 1 Ves. Jun. 22; 1 Wh. & Tu. L. C. 6th ed. 471.

(*v*) 45 & 46 Vict. c. 75, ss. 2, 5, 25.

(*w*) See Griffiths, 5th ed. 60, 67, 68, 69.

(*x*) See post, pt. v. ch. v.

(*y*) *Ex parte Hall*, 1 V. & B. 112; see *Adams* v. *Adams*, 8 Ir. Ch. Rep. 41; *Dobbyn* v. *Adams*, 7 Ir. Ch. Rep. 193.

ing(z) or, under certain circumstances, formerly of a parol agreement before marriage (a), or in consideration of an additional * portion after marriage, or of a [* 224] bargain between husband and wife (b), is deemed made for valuable consideration (c).

Are judgment creditors "purchasers" within the statute.

In the two old cases of *Girling* v. *Lowther* (d) and *Garth* v. *Ersfield* (e) it was held that a judgment creditor was a purchaser within this statute. These cases were commented on by Lord Hatherley (then Vice-Chancellor Sir W. P. Wood) in *Barton* v. *Vanheythuysen* (f), and cited by him as authorities to decide the point.

Contrary decisions.

If these two cases can be said to establish that a judgment creditor is a purchaser within the statute, they are directly opposed to a case decided about the same time, in which there was a voluntary settlement, and subsequent lessees, and also judgment creditors; the settlement was held void against the lessees but good against the judgment debts (g). The case is reported as if it had been a question of creditors, but lessees have always been considered purchasers, and the case is only intelligible on the assumption that it was decided on 27 Eliz. c. 4, though neither statute is mentioned.

Bevan v. *Earl of Oxford.*

The view that judgment creditors are purchasers within the meaning of the statute was overruled by the unanimous opinion of Lord Chancellor Lord Cranworth and Lords Justices Knight Bruce and Turner, in *Beavan* v. *Earl of Oxford* (h). The Lord Chancellor said the question was, whether judgment creditors were purchasers within the meaning of the statute of Elizabeth; in other words, was a judgment creditor a person who, in the language of the Act, had purchased any part of

(z) Post, pt. v. ch. v.; Dart, V. & P. 5th ed. 894, 895.
(a) Post, pt. v. ch. v.; but see *Crossly* v. *Elsworthy*, L. R. 12 Eq. 164; *Trowell* v. *Shenton*, 8 Ch. D. 318.
(b) *Teasdale* v. *Braithwaite*, 5 Ch. D. 630; *In re Foster and Lister*, 6 Ch. D. 87; *Shurmur* v. *Sedgwick*, 24 Ch. D. 597; post, pp. 289 et seq.
(c) Post, pp. 281 et seq.
(d) 2 Rep. Ch. 136 [262]. But see *Naylor* v. *Baldwin*, 1 Rep. Ch. 69 [130].
(e) Sir J. Bridg. 22.
(f) 11 Hare, 126.
(g) *Naylor* v. *Baldwin*, 1 Rep. Ch. 69 [130].
(h) 6 De G. M. & G. 492. This case has been followed in Upper Canada in *Gillespie* v. *Van Egmont*, 6 Chy. 553.

the lands comprised in the settlement, or "some rent, profit, or commodity in or out of the same"? "Independently of any authority," said his Lordship, "I confess I should have thought the proposition hardly arguable that a person who recovers judgment is a purchaser. A purchaser, in the sense in which the word is used in the statute, is one who gives money or other [* 225] valuable consideration in order * to have the land. The person who recovers a judgment may indeed eventually get the land, because under the Statute of Westminster he may take the land in execution, and therefore he is said to have, even independently of the last statute, a lien on the land; *but it is not by any purchase*, but by virtue of the right which the law gives him." In support of this, his Lordship cited the case of *Brace* v. *Duchess of Marlborough* (*i*), in which the second rule laid down is, "that if a judgment creditor, or creditor by statute or recognizance, brings in the first mortgage, he shall not tack or unite this to his judgment, &c., and thereby gain a preference; for one cannot call a judgment, &c., creditor a purchaser, nor has such creditor any right to the land; he has neither jus in re nor ad rem, and therefore, although he releases all his right to the land, he may extend it afterwards. All that he has by the judgment is a lien upon the land, but non constat whether he will ever make use thereof; for he may recover the debt out of the goods of the cognizor by fi. fa., or may take the body, and then during the defendant's life he can have no other execution; besides, the judgment creditor does not lend his money upon the immediate view or contemplation of the cognizor's real estate; for the land afterwards purchased may be extended on the judgment, nor is he deceived or defrauded though the cognizor had before made twenty mortgages of all his real estate; whereas a mortgagee is defrauded or deceived if the mortgagor before that time mortgaged his land to another."

Brace v. *Duchess of Marlborough.* Judgment may not be tacked to a mortgage; for it is not a purchase.

Lord Cranworth, after commenting on the old cases above referred to (*k*) and on *Barton* v. *Vanheythuysen* (*l*) which he said was merely a dictum, and not an actual decision to the contrary said: "The conclusion is thus irresistible that under the statute of Elizabeth, and inde-

Lord Cranworth's opinion.

(*i*) 2 P. Wms. 491; see also *Lacey* v. *Ingle*, 2 Ph. 413; *Barrow* v. *Gray*, 2 Cro. Eliz. 551–2; *Ross* v. *Pope*, Plowd. 72.

(*k*) *Girling* v. *Lowther*, 2 Ch. Rep. 136, and *Garth* v. *Erafield*, Sir J. Bridg. 22; and see *Ex parte Knott*, 11 Ves. 609.

(*l*) 11 Hare, 126.

pendently of the statute of the present Queen (*m*), these judgment creditors have no right as purchasers; they are not purchasers ; within the meaning of the statute of Elizabeth, and can, therefore, have no right against the voluntary settlement, (*n*).

Judgment creditor not a purchaser.

This case was followed and strongly ap- [226] proved by Lord Romilly, M. R., in *Kinderley* v. *Jervis* (*o*), and is fully in unison with the older case of *Whitworth* v. *Gaugain* (*p*), decided by Vice-Chancellor Wigram, and affirmed, on appeal, by Lord Lyndhurst (*q*), where much the same point was under discussion, although there the prior claim was by an equitable mortgagee against a subsequent judgment creditor, without notice.

The difficulty of the subject is increased by the statute 1 & 2 Vict. c. 110 (*r*), the 13th section of which enacts that judgment against any persons shall operate as a charge upon all lands, &c., of which such person shall be seised, &c., at the time or afterwards, "or over which such person shall at the time of entering up such judgment, or at any time afterwards, have *any disposing power* which he might, without the assent of any other person, exercise for his own benefit" (*s*), in the same way as if such person had had the power to, "and had by writing under his hand agreed to, charge" the lands with the amount of such judgment debt and interest thereon.

1 & 2 Vict. c. 110, s. 13.

But this, it seems, makes no difference; the judgment only binds the beneficial interest of the debtor in the lands over which he has a bonâ fide disposing power, and not the interest of other persons in those lands which he might by improper conduct obtain possession of ; the judgment is only made a charge on what was at the time really the property of the debtor. The Act does not say that the judgment creditors are to be in the same position as they would have been if there had been a charge for valuable consideration, especially when (as in the case of land subject to a voluntary settlement) the

Only refers to lands debtor may *honestly* dispose of.

(*m*) 1 & 2 Vict. c. 110, s. 13.
(*n*) Contra, *O'Donovan* v. *Rogers*, 7 Ir. Ch. Rep. 496.
(*o*) 22 Beav. 1.
(*p*) 3 Hare, 416.
(*q*) 1 Ph. 728.
(*r*) Extended to Ireland by 3 & 4 Vict. c. 105.
(*s*) That is, "not as a trustee" *Arnold* v. *The Mayor of Gravesend*, 25 L. J. Ch. 530.

debtor would, in making such a charge, be committing an act which the construction of another statute (*t*) declares to be a fraud (*u*).

[* 227] *An opposite conclusion was indeed come to by Lord Campbell and the Court of Q. B. in *Watts* v. *Porter* (*v*), dissentiente Sir W. Erle; but the actual decision in that case was on the 14th section (*w*) of the statute (*x*), which relates to stocks and shares, and, so far at least as it professes to govern the construction of the 13th section, it has been distinctly overruled (*y*). The statute 27 & 28 Vict. c. 112, does not appear to have altered the position of the judgment creditor in this respect. The judgment under it does not affect the land (*z*) of the debtor (*a*) until actually delivered in execution by virtue of a writ of elegit or other lawful authority. At the time that judgment takes effect, the land, as there defined, must be "the land of the debtor."

Judgment creditor not a purchaser.

It must therefore be taken as settled that a judgment creditor is not a purchaser within the meaning of the statute 27 Eliz. c. 4, and that the statutes 1 & 2 Vict. c. 110, s. 13, and 27 & 28 Vict. c. 112, have not altered his position in this respect (*b*).

The most plausible argument in favour of the judgment creditor is to suppose his judgment founded on

(*t*) 27 Eliz. c. 4.

(*u*) *Whitworth* v. *Gaugain*, 3 Hare, 416. S. C. 1 Ph. 728; *Bearen* v. *Earl of Oxford*, 6 De G. M. & G. 492–521; *Kinderley* v. *Jervis*, 22 Beav. 1; and Sir W. Earl's judgment in *Watts* v. *Porter*, 3 E. & B. 758, in which however, the majority of the judges decided the opposite; but see *Pickering* v. *The Ilfracombe Railway Co.*, L. R. 3 C. P. 295.

(*v*) 3 E. & B. 743.

(*w*) The current of decision is very strongly against *Watts* v. *Porter*, even on this section; see *Brearcliff* v. *Dorrington*, 4 De G. & Sm. 122; *Dunster* v. *Glengall*, 6 De G. M. & G. 532; *Langton* v. *Horton*, 1 Hare, 549; *Johnson* v. *Holdsworth*, 1 Sm. (N.S.) 106; *Hawkins* v. *Gathercole*, 1 Sim. (N.S) 63, 74; and see *Pickering* v. *The Ilfracombe Railway Co.*, L. R, 3 C. P. 235.

(*x*) 1 & 2 Vict. c. 110.

(*y*) By L.C. and L.JJ. in *Bearan* v. *Earl of Oxford*, 6 De G. M. & G. 492, particularly 524 et seq. and 532; and in *Kinderly* v. *Jervis*, 22 Beav. 28 et seq.

(*z*) Section 2. (*a*) Section 4.

(*b*) See also *Dolphin* v. *Aylward*, L. R. 4 H. L. 486, 500; *Evans* v. *Evans*, 2 Ir. Ch. Rep. 242; *Burgh* v. *Francis*, 1 Eq. C. Ab. 320, pl. 1; *Finch Winchilsea*, 1 P. Wms. 277; *Brearcliff* v. *Dorrington*, 4 De G. & Sm. 122, followed by *Dunster* v. *Glengall*, 3 Ir. Ch. Rep. 47; *Fury* v. *Smith*, 1 Hud. & Br. (Ir. Rep.) 735, Sug. V. & P. 10th ed. vol. 3, 362; *M'Auley* v. *Clarendon*, 8 Ir. Ch. Rep. 568; *Benham* v. *Keane*, 1 J. & H. 685, 698.

contract and not to be the result of a proceeding in invitum; and this no doubt may be the truth of the case where the judgment is voluntarily confessed; for the creditor may, in consideration of the confession of judgment, have agreed to forbear taking more active steps for the recovery of his debt, and may even have made an advance on the security of it. "But," said Sir James Wigram, V.C., "admitting that view to be correct, how does it alter the case? What was the contract? It was a general contract for a judgment and the *fruits of a judgment, and the original [* 228] question therefore,—what right does a judgment confer?—remains untouched" (*c*); so that a contract binding property for valuable consideration, though equitable only, will take precedence over a subsequent judgment, whatever may be the consideration for it, and whether obtained in invitum or by confession (*d*).

Where judgment obtained by agreement.

Any contract for value defeats subsequent judgments.

It makes no difference that the judgment creditor has acquired the legal seisin and possession of the land under an eligit without notice of the voluntary deed (*e*).

Possession under elegit without notice makes no difference.

In *Dolphin* v. *Aylward* (*f*), the debtor in 1802 submitted to two judgments in favour of his two sisters. In 1809 he made a voluntary settlement of real estate, subject to these two judgment debts, reserving to himself a life estate. In 1818 and 1819 he mortgaged the same estates. Subsequently to this, he confessed a judgment debt, the title to which became vested in the appellant, Dolphin. One of these two prior judgments was afterwards paid off by the settlor.

Dolphin v. *Aylward.*

The rights of the last judgment creditor formed the main question.

Lord Westbury pointed out that the mortgages were charges upon the entire estate conveyed by the settlor by the deed of 1809, and that the voluntary settlement of 1809 took effect only on the property remaining subject to those two mortgages, and subject, of course, to the prior judgments.

(*c*) *Wilworth* v. *Gaugain*, 3 Hare, 428, S. C. 1 Ph. 718. As to judgments being a subject of contract, see *Croft* v. *Lumley*, 6 H. L. C. 672; *Doe* v. *Carter*, 8 T. R. 300.

(*d*) Per Lord St. Leonards, in *Abbott* v. *Stratten*, 3 J. & Lat. 603, 614.

(*e*) *Whitworth* v. *Gaugain*, 3 Hare, 416, S. C. 1 Ph. 728.

(*f*) L. R. 4 H. L. 486; and see *Hales* v. *Cox*, 1 N. R. 344.

Lord Hatherly, L.C., explained the position of a judgment creditor as follows:—"It is quite settled that a judgment creditor can take no interest whatever, either legal or equitable, beyond what he acquires from the debtor; such an interest, in fact, as the debtor himself could give, and no other (*g*). Therefore, finding what is due on his judgment debt, he proceeds by elegit to enforce its recovery, and he takes the interest of his debtor in exactly the plight in which he finds it."

[* 220] *"He found it in this condition, that the settlor had conveyed the estates by way of voluntary settlement, reserving to himself only a life interest. As regards the judgment creditor, he had only the life interest of his debtor to look to, and could claim no part or share whatever in the reversion of the estate, which was vested under the voluntary settlement."

But judgment relates back against volunteers.

But in a case in Ireland (*h*), where a judgment and a voluntary (creditor's) deed were both registered on the same day, priority was given to the judgment, as relating back to the first day of the preceding term, the volunteers not being purchasers as against whom the relation back is taken away by the Statute of Frauds (*i*).

American law the same as to judgment creditors.

In America (where the statute 27 Eliz. c. 4, has been adopted) it has been decided, on the same principle, that a purchaser at a sheriff's sale, under a judgment and execution against the grantor of a voluntary deed, is not a purchaser as against the volunteers (*k*); in such a case of *involuntary* alienation by the settlor, the presumption of a fraudulent intention on his part cannot arise.

Trustees of creditors' deed on trust to sell whether purchasers.

A conveyance by a man to trustees to sell for the benefit of creditors will, it seems, sometimes constitute the trustees purchasers within the meaning of the statute.

Brown v. *Carter*.

In *Brown* v. *Carter* (*l*) a son, W. G., tenant in tail in remainder, joined his father, tenant for life, in a recovery for the purpose of raising £3000 for the father and resettling the estate, the son, W. G., taking back only an

(*g*) L. R. 4 H. L. at p. 500.
(*h*) *Beamish* v. *Phaire*, 11 Ir. Eq. Rep. 559.
(*i*) 29 Car. 2, c. 3, s. 15.
(*k*) *Ridgeway* v. *Underwood*, 4 Wash. 129; Story, Eq. Jur. 12th ed. vol. 1, s. 433.
(*l*) 5 Ves. 862.

estate for life (subject to his father's life estate), with remainder to his first and other sons successively in tail male. The father died, and the son, W. G., having married, but being without issue and being in embarrassed circumstances, conveyed the estate to trustees on trust to sell and pay off the £3000 and all his other debts, by a deed reciting the settlement, and shewing that he was then tenant for life, with remainder to his first and other sons, &c., remainder to himself in fee.

There was a provision that in case any doubt or difficulty should be made respecting the title of W. G., the debtor, to sell *the fee simple and inheritance, [* 230] the trustees should institute any suit or make application to Parliament to authorize and compel the then trustees or trustee to preserve contingent remainders during the life of W. G., and all other proper parties to join in the sale and conveyance.

The trustees of this deed filed their bill against the trustee of the settlement and the debtor, W. G., and the incumbrancer, praying that they might be enabled to carry the trusts for sale into execution, and that all the defendants might be decreed to join in a sale and conveyance; and it was argued for them that the settlement was voluntary, and therefore void against them as purchasers under the creditors' deed. The Master of the Rolls (Sir R. P. Arden) upheld the settlement, and refused to compel the trustees to join, on other grounds, and did not decide whether the creditor's trustees were to be considered as purchasers or not; but he seems to have been inclined to think that they were not, for he said: The bill was filed to compel the trustee to convey to the uses of the deed "by which W. G., becoming extremely encumbered, conveyed to trustees upon trust to sell for the payment of his creditors in general; for it is not a particular purchase for valuable consideration, except as such a deed for the payment of creditors generally can be so considered."

Difference between general creditors and specific incumbrancers.

This seems to point at the distinction afterwards made by Lord Eldon (*m*) between creditors and purchasers, that the latter have a specific charge against part of the property, having paid their money for that which creditors can only claim as part of the general assets.

(*m*) In *George* v. *Milbanke*, 9 Ves. 196; see *Brace* v. *Marlborough*, 2 P. Wms. 491; *Taylor* v. *Wheeler*, 2 Vern. 565; ante, p. 80.

Fraud not presumed.

For as fraud is never to be presumed (*n*), the natural inference when a man conveys his general property to trustees for his creditors is, that he intends to put them in his own place, and to give them such interest in the property as he had a right to convey; not that he intended—in derogation of his own previous grant—to give them that to which, quâ creditors, they would have had no claim

Butterfield v. *Heath.*

[* 231] * In *Butterfield* v. *Heath* (*o*), however, where husband and wife after marriage settled property which had come to them in right of the wife, and then joined in mortgaging the same property with a power of sale, and afterwards in conveying it expressly and specifically to trustees upon trust to sell and distribute the proceeds among the husband's creditors, the Master of the Rolls held the settlement void against them as purchasers. He said: "I do not understand that any question arises under the deed of conveyance to the plaintiff. I have not had a copy of it before me; but I understand it to be a conveyance to certain creditors of Mr. P. in trust to sell and divide the proceeds among his creditors, and that the trustees themselves, being creditors of Mr. P., have executed this deed. If this be so, the plaintiff 's are purchasers." Here it must be observed, the settlors had repudiated their settlement, by mortgage with a power of sale, before making the conveyance for creditors; and that that was a conveyance of the particular estate, not a general grant. The above case of *Brown* v. *Carter* (*p*) was not referred to.

Specific mortgage to creditor makes them purchasers.

Barton v. *Vanheythuysen.*

But in *Barton* v. *Vanheythuysen* (*q*) the debtor, R. E. V., executed a mortgage deed, whereby he was expressed to grant, convey, and assign to a trustee, his heirs, executors, administrators, and assigns, all and singular the real and personal estate, rights, and credits whatsoever and wheresoever of him the said R. E. V., in trust to sell the same, and out of the proceeds of such sale to satisfy the debt owing to S.

General assignment (it was argued) not a sale of the "same lands," &c.

It was argued that, inasmuch as the conveyance was expressed in *general* words, and purported to convey all the real and personal estate of the debtor without

(*n*) *Leukener* v. *Freeman*, Freem. Ch. 236; *Trenchard* v. *Wanley*, 2 P. W. 167; *M'Cormick* v. *Grogan*, L. R. 4 H. L. 82, 97.
(*o*) 15 Beav. 408.
(*p*) 5 Ves. 862.
(*q*) 11 Hare, 126, 131-2.

particularizing the estate which was subject to the voluntary settlement, such estate was not intended to, and did not, pass; and that the 2nd section of the statute 27 Eliz. c. 4, restricts the operation of the statute to cases in which the purchaser for valuable consideration takes "*the same* lands, tenements, or hereditaments." It was said that persons taking under a conveyance by such general words could not be said to be purchasers of the "same" estate, which under the * cir- [* 232] cumstances, and in the absence of any precise expression to that effect, it was not reasonable to suppose was intended by the grantor to be comprised. Lord Hatherly (then Vice-Chancellor Sir W. P. Wood) said: "The fallacy in this argument consists in assuming that the first objection has been sustained, and in regarding the H. estate as not in truth the propertyof R. E. V." (the debtor), "which, as between himself and a subsequent purchaser, I have held it to have been. I am of the opinion that R. E. V. had clearly power to pass the estate to a purchaser. This Court would not have interfered to restrain him from doing so, but would, on the contrary, have assisted a purchaser for value in procuring a conveyance. It cannot be disputed that, in taking the mortgage of. November, 1851, S. had a perfect intention to acquire all that R. E. V. could give; and, taking the estate to be his, as between him and the purchaser, the words of description, 'all my estate,' would be sufficient to embrace it. That the statute has been expounded favourably and not narrowly, is, I think, clear on the authorities." His Honour then proceeded to cite *Girling* v. *Lowther* (*r*) and *Garth* v. *Ersfield* (*s*) as shewing that creditors, by judgment and recognizance (whose position is analogous), are purchasers within the statute, and concluded his judgment on this question by saying that, both on principle and authority, the mortgagees were entitled to the real estate comprised in the voluntary settlement, as against the parties claiming under that settlement.

He held that the *general* mortgagees to secure antecedent debt were purchasers.

This case stands alone, and the authorities which were relied on in it have been expressly overruled (*t*) so far as they decide the point for which they were quoted —viz., that judgment creditors are purchasers. Lord St. Leonards has remarked that the decision may require further consideration (*u*).

(*r*) 2 Rep. Ch. 136.
(*s*) Sir J. Bridg. 22.
(*t*) Ante, pp. 224, 225.
(*u*) Sug. V. & P. 14th ed. 713.

All that this case has actually decided is, that a mortgage to a particular creditor to secure his debt makes that creditor a purchaser within the statute, even if the mortgage is only in general terms of *all the estate*, real and personal, of the debtor, without any specific descrip-
[* 233] tion of the particular estate comprised * in the previous voluntary deed. But if one general assignment for payment of debts is a purchase, why not all? And if so, a general assignment by a debtor under the Bankruptcy Act, 1861 (*r*), which has never been taken to have this effect, or even the general transfer of all the property, real and personal, of the debtor to his trustee in bankruptcy, as effected by the Bankruptcy Acts, 1869 (*w*) and 1833 (*x*), and previous Bankruptcy Acts (*y*), must be taken to be within the same principle: both transfers are general, and both are for the same kind of consideration—viz., a pre-existing debt.

If a general assignment is a purchase of particular estate, a bankruptcy is.

This view is borne out by the case of *Cadell* v. *Bewley* (*z*), in which A. covenanted, while solvent, to make a voluntary settlement; three days after executing it, he covenanted to convey all his property to trustees for his creditors. The trustees of the settlement sold the property comprised in it. The trustees under a deed of inspectorship for his creditors claimed the purchase-moneys. It was held that the trustees under the deed for creditors could not support their claim as bonâ fide purchasers within the statute; and that, even if they were such purchasers, they could not claim the purchase-moneys.

The only distinction that can be drawn is, that such a transfer as was made in *Barton* v. *Vanheythuysen* (*a*) is the act of the debtor himself; whereas an adjudication in bankruptcy is a proceeding in invitum against the debtor.

Assignees and trustees in bankruptcy not purchasers for value.

Assignees and trustees in bankruptcy, though for many purposes looked on as assignees for valuable consideration (*b*), have, in fact, never been so regarded for all purposes; "they stand in the place of the bank-

(*r*) 24 & 25 Vict. c. 134, ss. 192 et seq.
(*w*) 32 & 33 Vict. c. 71, ss. 17, 22, 83 (6), (7), (8).
(*x*) 46 & 47 Vict. c. 52, s. 4.
(*y*) Sug. V. & P. 14th ed. 725. The Bankruptcy Act, 1849, was in force when this case was decided.
(*z*) 15 W. R. 703.
(*a*) 11 Hare, 126.
(*b*) *Collet* v. *De Gols*, Forr. Ca. t. T. 65.

rupt, and are bound by all acts fairly done by him, notwithstanding they gain the legal estate" (*c*), but are not considered as purchasers of the legal estate for a valuable consideration for every purpose (*d*). And if they were to be considered purchasers, * the [* 234] great difference between the two statutes of Elizabeth, and the distinction drawn by the highest authority and always adhered to since (*e*), would be done away with; a voluntary settlement, however fair, honest and praiseworthy, made by a man in no way indebted nor meaning a fraud, would never be safe against the possibility of his subsequent bankruptcy. In *In re Cross* (*f*) a term of years was bequeathed to the wife of A., who conveyed all his interest therein to his wife, and afterwards became bankrupt. On application by the assignee in bankruptcy for an order for sale of the term for the benefit of creditors, it was held that as A. could under 27 Eliz. c. 4, have defeated this settlement by a subsequent sale for value, his assignees, by leave of the Court, could also defeat it; but the application was refused.

If so, subsequent bankruptcy would always avoid a voluntary settlement.

Again, the rule, no doubt, in general is, that all voluntary conveyances are void as against subsequent purchasers; but it is submitted that a conveyance by general words to a creditor does not come within the reason, though possibly within the letter, of the doctrine. The reason of the doctrine is, that the inconsistency of the two conveyances, and the impossibility of their both taking effect, is a proof of fraud; but how is it inconsistent for a man to make a voluntary settlement of

Purchasers by *general* words not within the reason of the rule.

(*c*) Per Lord Hardwicke, in *Walker* v. *Burrows*, 1 Atk. 94.

(*d*) By the Bankruptcy Acts, 1869 (32 & 33 Vict. c. 71), s. 15 (4), and 1883 (46 & 47 Vict. c. 52), s. 44 (2) ii., the property of the bankrupt made available for creditors includes the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or during its continuance (or before his discharge, Act 1883), except the right of nomination to a vacant ecclesiastical benefice; and similar provisions have been contained in previous Bankruptcy Acts. It might be thought that these sections would give to the trustees the power of selling to a purchaser land previously settled voluntarily; but it is apprehended that their operation must be confined to giving the trustees the right to exercise all powers which the bankrupt might *honestly* have exercised, and that the construction of these provisions must be analagous to that of the 13th and 14th sections of the 1 & 2 Vict. c. 110, on which see ante, pp. 226 et seq.

(*e*) See ante, pp. 15, 36, 45, 50,

(*f*) 19 W. R. 153.

part of his estate, and then, perhaps twenty years afterwards, having become embarrassed, to make a general conveyance of all his real and personal estate? It can only be got at by presuming a fraudulent intention, which the words of the conveyance do not warrant (*g*). The presumption always is, in theory, that the subse-
[235] quent purchaser is deceived, *and can only get what he bargained for by the avoidance of the prior voluntary deed (*h*).

Voluntary deed only void so far as it breaks in on subsequent purchase.

Again, a voluntary settlement will only be avoided so far as is necessary to give effect to the subsequent purchase for value; and the full intention apparent on the face of a deed of conveyance, in general terms, may be carried into effect without avoiding any prior deed (*i*)

Case of judgment creditors analogous.

Many of the arguments, moreover, which have been used to shew that judgment creditors are not purchasers within the statute apply with equal force to the case of persons claiming to be purchasers under a general conveyance for creditors:—they did not lend their money on the faith of the land, or with the view of taking the specific piece of land which was before settled voluntarily.

Entitled as purchaser for valuable consideration without notice.

A purchaser under this statute is a purchaser in the highest sense of the word, but it could hardly be contended that a trustee, under a general conveyance for the payment of a debt, would be, with regard to each specific portion of land, entitled to that favour which is shewn in equity to a purchaser for valuable consideration without notice (*k*).

Parker v. *Serjeant.*

In *Parker* v. *Serjeant* (*l*) a man agreed, on the marriage of his nephew, to settle (on a certain event) "an

(*g*) And does not the maxim, that fraud is never to be presumed, apply to such a case? *Leukener* v. *Freeman*, Freem. Ch. 236; *Lady Gorge's Case*, Cro. Car. 550; *M'Cormick* v. *Grogan*, L. R. 4 H. L. at p. 97. "Fraus est odiosa et non præsumenda": Cro. Car. 550.

(*h*) See *Bennett* v. *Bernard*, 10 Ir. Eq. Rep. 584, 588; ante, pp. 187, 188.

(*i*) So that where settled lands were included in a mortgage with other unsettled lands, the latter were held primarily liable: *Hales* v. *Cox*, 1 N. R. 344; and see *Dolphin* v. *Aylward*, L. R. 4 H. L. 499–500; post, pt. vi. ch. i.

(*k*) *Basset* v. *Nosworthy*, Finch. 102; Wh. & Tu. L. C. 6th ed. vol. 2, 1.

(*l*) Finch. 146, 148.

estate in fee of all other his messuages and lands (in the bill mentioned), the whole being of the yearly value of £700;" the lands being short of the value of £700 a year, it was held that the deficiency could not be supplied out of a previous settlement made by the uncle on his wife. It was said, "though the said settlement was voluntary, and made with a power of revocation, which, by the very letter of the statute 27 Eliz. c. 4, would make it fraudulent against any purchaser, yet it could not be so against the nephew or his wife; for it could not be made with intent to deceive her, because it was made so long before her marriage, and the lands which were thus in jointure to *the aunt [*236] were *no part of the particular* whereon the said marriage was made between the nephew and her." . . . . "Therefore the nephew and his wife cannot be accounted such purchasers so as to avoid the settlement made on the aunt as fraudulent because there was a power of revocation in it; for it would be unreasonable to subject an estate settled long before (as this was in jointure to the aunt) to make good the value of a particular wherein that estate was not so much as mentioned."

Prior voluntary settlement not void against general charge of annuity on lands by marriage settlement.

And so also in a case mentioned by Coke (*m*), where S. C., having a lease for sixty years, if he lived so long, forged a lease for ninety years absolutely, and, by indenture reciting the forged lease, for valuable consideration bargained and sold the forged lease and *all his interest in the land* to R. G. Sir Edward Coke thought that R. G. was no purchaser within the statute of 27 Eliz. c. 4, for he contracted not for the true and lawful interest, for that was not known to him, for then perhaps he would not have dealt for it, and the visible and known term was forged; and although *by general words* the true interest passed, notwithstanding he gave no valuable consideration nor contracted for it; and of this opinion were all the judges.

Cases in Coke.

It is observed by Roberts (*n*) that it seems clear on principle, and agreeable to all the determinations of the Court of Chancery, that a trustee appointed under a voluntary settlement cannot become a bonâ fide purchaser so as to dissolve the connection between himself and his cestuis que trust, and that he cannot, by paying

Trustee of voluntary deed whether a purchaser.

(*m*) Co. Litt. 3 b; *Bennett* v. *Bernard*, 10 Ir. Eq. Rep. 584, 588.
(*n*) Fraud. Conv. 389; see notes to *Fox* v. *Mackreth*, Wh. & Tu. 6th ed. vol. 1, 174 et seq.

a full value, destroy his character of trustee; but he cites no authority for this proposition. Whatever might be the result of an action by a trustee of a voluntary conveyance of land to enforce a subsequent contract for the purchase of it by himself, it seems that a trustee may afterwards purchase the trust estate from the voluntary settlor as against his cestuis que trust.

Doe v. *Bottriell.*

In a case in the Court of King's Bench (*o*) J. L., seised in fee of copyholds, made a voluntary surrender to the use of G. R. and T. T. (the lessor of the plaintiff) [*237] on trusts for himself and his *issue, and not long afterwards, in consideration of a fair price paid by the said T. T., again surrendered the premises to T. T. for life, remainder to the use of such persons as T. T. should by will appoint, or in default to the right heirs of T. T. It was argued that as T. T. was a trustee under the first deed, he could not be a purchaser within the statute, and as the legal estate was by both conveyances vested in the same person, he could not defeat the first conveyance to himself, nor could he be considered as a person defrauded or deceived within the statute, and that a case might be supposed where a party would have to pay the penalty (*p*) to himself. But the Court (*q*) unanimously held that T. T. was not disqualified from becoming a purchaser, and that the voluntary conveyance was void against him; for, if the first conveyance was fraudulent, it was void from the first though the purchaser had notice.

A mere trustee cannot sell.

But of course a trustee who has, by the direction of the persons beneficially entitled, made a voluntary conveyance, cannot afterwards defeat it by his own sale for value to a purchaser with notice of the trust (*r*).

Must the grantor of the voluntary deed and the vendor to the purchaser be the *same* person?

The next question is, whether a person is entitled to rank as a purchaser within the statute who buys, not from the grantor of the voluntary deed, but from some other person claiming under him, either as grantee of a second voluntary instrument or as *heir* or *devisee*? In other words, does the statute 27 Eliz. c. 4, operate to avoid a voluntary deed, as against a subsequent purchaser,

(*o*) *Doe* d. *Tunstill* v. *Bottriell*, 5 B. & Ad. 131.

(*p*) 27 Eliz. c. 4, s. 3. But the penalty is only on those who "put in ure, avow, maintain, justify, or defend" the fraudulent conveyance; see post, pt. vi. ch. i.

(*q*) Denman, C.J., and Littledale, Parke, and Patterson, JJ.

(*r*) *Shelden* v. *Handbury*, F. Mo. 757; Vin. abr. vol. 13 p. 527.

where the grantor of the voluntary deed and the vendor for valuable consideration are not the same person? (*s*)

Such cases are not affected by the construction of the Registry Acts, under which a subsequent registered deed will be preferred to a prior unregistered one, although both be on valuable consideration (*t*). The difference is obvious. By those statutes *non- [* 238] registration is the proof of fraud as against any subsequent registered conveyance, independently of any consideration whether the person executing the first was, or was not, the same person who executed the second; but in questions on constructive fraud under 27 Eliz. c. 4, as shewn by a voluntary conveyance followed by a sale for value, the fraud of the *grantor* is the material point.

Cases under Registry Acts different.

Cases of actual fraud, too, must be put out of the question. It is easy to imagine a case of this nature, in which the statute would operate: A father, having two sons, might make a voluntary settlement of his fee-simple lands on himself for life, remainder to the younger son in fee. After the father's death the sons might agree together that the elder should take possession of the lands, and that the younger son should conceal the settlement on him until his brother had sold the land as his father's heir-at-law, and that then the voluntary settlement by the father should be produced to defeat the bonâ fide purchaser; by which arrangement, if allowed, one son would get the purchase-money and the other the land (*u*).

Actual fraud also different.

Instance.

This according to the opinion of the Court in *Richards* v. *Lewis* (*v*), was the meaning of the first resolution in *Burrel's Case* (*w*), which was, that "if the father makes a lease by fraud and covin of his land to defraud others to whom he shall demise or sell it (as all fraudulent leases should be so intended), and before the father sells or demises it he dies; and the son, knowing or

Burrel's Case.

(*s*) *Burrel's Case*, 6 Rep. 72 a; *Clerk* v. *Rutland*, Lane, 113; *Blake* v. *Hyland*, 2 Dr. & Wal. 397; *Jones* v. *Whittaker*, Longfield & T. Ir. Ex. 141; *Parker* v. *Carter*, 4 Hare, 400.

(*t*) *Warburton* v. *Loveland*, 2 Dow. & Cl. 480, as explained by Lord Plunket in *Blake* v. *Hyland*, 2 Dr. & Wal. 397, and by Lord Campbell in *Doe* v. *Rusham*, 17 Q. B. 735.

(*u*) As to cases of persons losing their rights by concealing them, and standing by while a purchaser purchases, see ante, p. 197, note (*n*).

(*v*) 15 Jur. 512, S. C. 11 Com. B. 1035.

(*w*) 6 Rep. 72 a. In *Clerk* v. *Rutland*, Lane, 113, the same construction appears to have been put on this case.

not knowing of the said lease, sells the land on good consideration; in that case the vendee shall avoid that lease by the said act;" "and it is not necessary that he who sells the land should make the former estate or incumbrance; but, be the estate fraudulent *ut supra*, whosoever sells [makes] it, the purchaser shall avoid such fraudulent estate, &c.; and therefore in the case at bar the said leases being, *on the evidence*, thought fraudulent, the vendee of the father and heir shall avoid them" (*x*).

Misconstrued.

Burrel's Case (*y*) has however, frequently been cited [* 230] as laying *down that a voluntary deed is *constructively* fraudulent as against a vendee from a person different from the author of the voluntary deed (*z*); but the facts of the case do not warrant this assertion.

Statement of *Burrel's Case.*

They were as follows:—The grandfather, on the marriage of the father, covenanted to and afterwards did demise the premises in question to the father for 1000 years. The father, seven years afterwards, assigned the lease to his son, then an infant, that it might not be merged by descent of the reversion, and with a colourable intent that the infant should pay debts. The grandfather died; the father entered and took the profits, and nothing was done by the son under the assignment of the lease. Afterwards, the father sold the land to a purchaser for a large sum of money, and it was held that the purchaser should avoid the lease for 1000 years and the assignment. Now it is clear that the assignment by the father to the son, being a mere voluntary gift, was void against the purchaser from the same person—the father; and, that assignment being out of the way, the original lease became merged in the freehold. All, therefore, that it was necessary for the Court to do was to declare the assignment void against the purchaser (*a*). The subsequent resolution therefore, that "it is not necessary that he who sells the land should make the former fraudulent estate," must either be taken, as was done in *Richards* v. *Lewis* (*b*), to apply only to cases of *actual* fraud (*c*), or, on the authority of Lord Campbell and the Court of Queen's Bench in *Doe* v. *Rusham* (*d*), as the resolution

Either applies only to actual fraud.

(*x*) Sug. V. & P. 14th ed. 713. (*y*) 6 Rep. 72 a.
(*z*) *Warburton* v. *Loveland*, 2 Dow. & Cl. 487; *Jones* v. *Whittaker*, Long. & Towns. 141; *Blake* v. *Hyland*, 2 Dr. & Wal. 397.
(*a*) Rob. Fraud. Conv. 380.
(*b*) 20 L. J. C. P. 177, S. C. 11 Com. B. 1035.
(*c*) See also *Lewis* v. *Rees* 3 K. & J. 132; Sug. V. & P. 14th ed. 713.
(*d*) 17 Q. B. 726.

goes beyond what is required by the facts of the case, or is not it cannot be considered conclusive. conclusive.

In the first case of *Richards* v. *Lewis* (*d*), it was held that a voluntary deed, not actually fraudulent, by which husband and wife settled the wife's term of years on themselves for their joint lives, remainder to a son of the wife by a former husband, was not avoided pro tanto by a mortgage made by the widow surviving. *Richards* v. *Lewis.*

Williams, J., said the consequence of holding the contrary * would be, that if a father disinherited [* 240] his heir with the full intention that the conveyance should operate by way of gift to his younger children, the heir would have power to nullify it by sale of the premises.

In *Doe* v. *Rusham* (*e*), the facts, as stated by Lord Campbell, C. J., in delivering the judgment of the Court of Queen's Bench, were as follows:—John Newman, being seised in fee, by deed dated July 3, 1833, covenanted to stand seised to himself for life, remainder to Sarah Newman (his daughter-in-law) for life, remainder to George Newman (his grandson), the lessor of the plaintiff in fee. On March 16, 1844, John Newman made his will and devised the premises to Sarah Newman for life, remainder to Thomas Morse in fee. *Doe* v. *Rusham.*

John Newman was buried March 19, 1844. On April 5, 1847, Sarah Newman and Thomas Morse sold and conveyed he premises to the defendant for £100. Sarah Newman died on May 2, 1849. The conflict, therefore, was between the grandson, who claimed under the deed of 1833 (admitted to be voluntary), and the purchaser from the devisee of John Newman, the voluntary doner, by whose will the grandson was excluded. A verdict had been found for the plaintiff (the grandson), and a rule nisi had been obtained to enter a verdict for the defendant.

Lord Campbell, after commenting on and explaining *Burrel's Case* (*f*) and other authorities, said that when a man has made a voluntary conveyance of land, the only estate in the land which remains in him is the power of selling to a bonâ fide purchaser for value; but he clearly has no estate which he can convey to any one but a purchaser for value; so that John Newman,

(*d*) 20 L. J. C. P. 177, S. C. 11 Com. B. 1035.
(*e*) 17 Q. B. 724. (*f*) 6 Rep. 72 a.

when he had made his will in 1844, had no estate which he could devise to Thomas Morse; and if the devisee took *nothing*, how is it possible that he can convey anything to a purchaser?

Difference between purchaser from heir and from devisee.

There is some difference between the case of a purchaser from an heir and that of a purchaser from a devisee; in the former case the ancestor has done no act [* 241] whereby he has shewn any intention * to repudiate his voluntary conveyance, whereas in the latter the testator has done such an act by the devise in his will. But that act of devising does not shew any intention in his mind to sell the property, nor that his devisee shall sell it, and therefore no inference of an intention to defraud purchasers by the voluntary conveyance can be raised by reference to the time of the voluntary conveyance being made. In truth, neither heir nor devisee in such a case has any estate in him, and therefore cannot possibly pass any to a purchaser (*g*).

Grantor of voluntary deed and vendor must be same person.

This case, and that in the Common Pleas, which, were followed in Chancery in *Lewis* v. *Rees* (*h*), must be taken as overruling the decision of the Irish Court of Exchequer in *Jones* v. *Whittaker* (*i*), and the extra-judicial dicta to a contrary effect in the opinion of the judges given on the case of *Warburton* v. *Loveland* in the House of Lords (*k*). Endless confusion might be caused by the adoption of the opposite rule, which would in fact be to prefer a subsequent to a prior voluntary conveyance.

So too in America.

The same qualification of the right of a subsequent purchaser to avoid a prior voluntary conveyance—namely, that both the conveyances must have been made by the same person—is the law in America (*l*).

Death of settlor after contract for sale.

But if after a completed contract for sale of the property the original settlor dies, his heir or devisee can of course obtain the benefit of the contract by completing

(*g*) *Doe* v. *Rusham*, 17 Q. B. 734. So in *Jones* v. *Purefoy*, 1 Vern. 46: "The settlement was made by the grandfather" (on a grandson), "and the estate passed from him; but the mortgage was made by the father, *who was never seised nor possessed of the estate.*" See also *Anderson* v. *Elsworth*, 3 Giff. 166, 170; *Parker* v. *Carter*, 4 Hare, 409–410; *Lewis* v. *Rees*, 3 K. & J. 132.

(*h*) 3 K. & J. 132.

(*i*) Longfield & Townsend, 141.

(*k*) 2 Dow & Cl. 487.

(*l*) Story, Eq. Jur. 12th ed. s. 434 a.

the sale (*m*), or the purchaser can compel him to perform it (*n*), for he who has contracted for the purchase is in equity a purchaser within the statute (*o*).

Notice immaterial.

The fact that the purchaser had no notice of the voluntary conveyance by his vendor's ancestor or devisor has sometimes been urged in his favour, but there is, it seems, no weight in this (*p*), *unless so far as [* 242] it might be important as evidence of actual fraud (*q*).

Sufficient if author of voluntary deed and vendor are *virtually* same person.

But where the first conveyance and the sale are virtually made by the same person, it is sufficient, though they are apparently and technically made by two separate persons. Thus, where (*r*) T. B., seized of land in fee or fee tail, conveyed it by bargain and sale to E. C. in fee, and E. C. suffered a recovery and declared the uses to T. B. for life, &c., with power for him to revoke: T. B. having afterwards sold the land to a purchaser, the objection that the settlor and the vendor were not the same person was overruled, and it was held that as the settlement was *in fact* made by T. B. it was void against a subsequent sale by him (*r*).

Conveyance of *different* interests in same land by different persons, otherwise.

A somewhat analogous case is where two persons having *different* interests in the same property make successive and antagonistic conveyances; thus in *Hunt* v. *Gateley* (*s*) there were tenant in tail and remainderman; the latter made a voluntary grant of rent, and afterwards tenant in tail suffered a common recovery in favor of a purchaser, and it was argued that the voluntary rent-charge was within the statute; but all the justices agreed clearly that (though of course of no effect against the purchaser) it was not void by 27 Eliz. c. 4, because by that statute the grant must be made by him who made the sale, and here the tenant in tail made the sale, and he in remainder the grant of rent.

(*m*) *Willats* v. *Busby*, 5 Beav. 193.

(*n*) *Hatton* v. *Neale*, Bul. N. P. 90 a. 261 a; ante, p. 203; *Clarke* v. *Willott*, L. R. 7 Ex. 313; *Peters* v. *Nicolls*, L. R. 11 Eq. 391; *Rosher* v. *Williams*, L. R. 20 Eq. 218.

(*o*) Ante, p. 219.

(*p*) *Jones* v. *Purefoy*, 1 Vern. 45.

(*q*) *Doe* d. *Bothell* v. *Martyr*, 1 B. & P. (N.R.) 342.

(*r*) *Bullock* v. *Thorne*, F. Mo. 615–6; ante, p. 214; Rob. Fraud. Conv. 616.

(*r*) *Bullock* v. *Thorne*, F. Mo., 645–6; ante, p. 214; Rob. Fraud. Conv. 616.

(*s*) F. Mo. 154, 158.

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*PART IV.

WHAT IS A VALUABLE CONSIDERATION UNDER THE STATUTES OF ELIZABETH.

CHAPTER I.

CONSIDERATION GENERALLY.

In what cases the question of the consideration is of importance.

It will be found that the question, whether a deed or transaction is voluntary or is made on good consideration, is only of importance as against *creditors* where it is bonâ fide; for if it is not bonâ fide (*a*)—that is if it is made with the actual and express intention of defeating creditors—that is sufficient to make it void under 13 Eliz. c. 5, even if it be on full and valuable consideration (*b*), and much more so if it is voluntary (*c*).

Mala fides supersedes all inquiry into the consideration; but bona fides alone is not always sufficient to support a transaction not founded on any valuable consideration (*d*).

There are many points as to which the question, whether a deed is voluntary or made for valuable consideration, is of importance (*e*); for a voluntary conveyance by a person indebted is void against his debts merely for being voluntary (*f*); and an assignment to defeat execution (*g*), or forfeiture (*h*), or not followed by a change of possession (*i*), which, if supported by [* 244] * valuable consideration, would be good, is in general void if voluntary.

(*a*) Ante, pp. 78 et seq.
(*b*) Ante, pp. 84 et seq.
(*c*) Ante, p. 41.
(*d*) *Russel* v. *Hammond*, 1 Atk. 13 West, t. H., 330; *Nunn* v. *Wilsmore*, 8 T. R. 528; ante, pp. 36 et seq.
(*e*) Post, pt. v. ch. iii.
(*f*) Ante, pp. 6, 35.
(*g*) Ante, pp. 72, 99.
(*h*) Ante, pp. 71, 72.
(*i*) Ante, pp. 113 et seq.

This chapter, then, will be confined to cases in which, the *bona fides* having been established or not disputed, the question remains as to the consideration, whether it is valuable and sufficient, or whether the conveyance is voluntary, and for *that* reason void against *creditors* (*k*). Cases in which the only question is as to the consideration.

The same kind of question arises under 27 Eliz. c. 4. 27 Eliz. c. 4, much the question.

The distinction is that, as regards the latter statute, the inquiry is, what consideration will support a deed against subsequent *purchasers;* against whom, as a general rule, *all* voluntary conveyances are void, and all made on sufficient and valuable consideration are unimpeachable, in the absence of fraud.

As the amount of consideration necessary under both statutes is in general much the same, it will be convenient to treat of them both at the same time (*l*).

It was laid down by the Court of Exchequer in *Currie* v. *Misa* (*m*) that a valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. What is a valuable consideration.

Under both statutes, of course, such a consideration as "5*s.* and other valuable considerations" does not oblige the Court to hold the conveyance, at all events, to be for valuable consideration, and can, at most, only let the parties thereto into proof that there were other valuable considerations (*n*); in fact, any consideration entirely inadequate is of no avail (*o*). Consideration nominal. Inadequate.

So a settlement by demise of leaseholds under which the * trustees were liable to the payment of 1*s.* [* 245]

(*k*) *Peat* v. *Powell*, Amb. 387; *Partridge* v. *Gopp*, 2 Amb. 599; ante, p. 15.

(*l*) Post, pp. 259, 260.

(*m*) L. R. 10 Ex. 162; and see Com. Dig. Act, on case Ass. B. 1–15.

(*n*) *Walker* v. *Burrows*, 1 Atk. 94.

(*o*) *Partridge* v. *Gopp*, 2 Amb. 596; *Mathews* v. *Feaver*, 1 Cox, 278, 280; *Dewey* v. *Bayntun*, 6 East, 257, 282; *Copis* v. *Middleton*, 2 Mad. 431 et seq.; *Hale* v. *Allnutt*, 18 C. R. 527; *Strong* v. *Strong*, 18 Beav. 408; and see *Tarleton* v. *Liddell*, 17 Q. B. 390, 414. As to how far the smallness of the price paid may be evidence that the purchaser was a party to the fraud, see *Lee* v. *Hart*, 10 Ex. 560; *Llanelly Railway and Dock Co.* v. *London and North-Western Railway Co.*, L. R. 8 Ch., per Mellish, L.J., 958.

if demanded, and beyond that were under no liability, was held void against a subsequent mortgagee under 27 Eliz. c. 4 (*p*).

Inadequate.

There must be a real consideration paid, or a fair interchange of interests; for though mere inadequacy of price is not in general a circumstance which will of itself make an assignment void (*q*), yet, if the inadequacy is very great—at least, if it is so palpable that it must be taken to have been a fraudulent contrivance between the parties—the transaction will be void against *creditors* (*r*), especially if what little consideration was given consisted of an existing debt (*s*). So where a man in extremis assigned to his mother policies of assurance on his life amounting to £800 in consideration of a debt of £174 3*s*. 6*d*. owing to her, it was set aside as a fraud on his creditors (*t*); and where gross inadequacy of price is coupled with want of possession it will generally be fatal to the sale (*u*). A deed of sale on grossly inadequate consideration may be set aside so far as it purports to be an absolute conveyance, and may stand as security only for the moneys actually advanced (*v*); and

Failure of.

where the consideration has *failed* through the fraud of the vendor the contract on the part of the vendee in consideration of it will not be enforced against him (*w*).

Meritorious.

Deeds founded on meritorious considerations alone, such as natural love and affection, or made simply as provisions for a wife or children, or in discharge of any other moral, but not legal, obligation, are looked upon as merely voluntary within the statutes of Elizabeth (*x*), [* 246] for the "good" consideration required * by

(*p*) *Shurmur* v. *Sedgwick*, 24 Ch. D. 597.
(*q*) *Copis* v. *Middleton*, 2 Mad. 423; ante. p. 81.
(*r*) *Strong* v. *Strong*, 18 Beav. 408; *Hall* v. *Allnutt*, 18 C. B. 505, 527; *Tennent* v. *Tennents*, L. R. 2 H. L. Sc. 6; vide supra, p. 84.
(*s*) Vide ante, pp. 94 et seq.; post, p. 252.
(*t*) *Stokoe* v. *Cowan*, 29 Beav. 637.
(*u*) *Dewey* v. *Bayntun*. 6 East, 257.
(*v*) *Hollamby* v. *Oldrieve*. W. N. (1866) 94, under 13 Eliz. c. 5; *Doe* v. *Routledge* 2 Cowp. 712, 713; *Douglas* v. *Culverwell*, 3 Giff. 251; and see *Lomax* v. *Buxton*, L. R. 6 C. P. at p. 111.
(*w*) *Tarleton* v. *Liddell*, 17 Q. B. 390, 414.
(*x*) *Woodie's Case*, cited in *Colvile* v. *Parker*, Cro. Jac. 158; *Twyne's Case*, 3 Rep. 81 b; *Chapman* v. *Emery*, 1 Cowp. 278; *Stiles* v. *Attorney-General*, 2 Atk. 152; *Evelyn* v. *Templar*, 2 Bro. C. C. 148; *Taylor* v. *Jones*, 2 Atk. 600–3; *Mathews* v. *Feaver*, 1 Cox, 280; *Doe* v. *Rowe*, 4 Bing. N. L. 737; *Goldsmith* v. *Russell*, 5 De G. M. & G. 547, 555; *Penhall* v. *Elwin*, 1 Sm. & G. 270; *Tweddle* v. *Atkinson*, 1 B. & S. 393–9.

them (*y*) has always been construed to mean "valuable" consideration (*z*).

In *Mathews* v. *Feaver* (*a*) Sir Lloyd Kenyon said; "This is a transaction between father and son, and natural love and affection, is mentioned as part of the consideration, upon which, as against creditors, I cannot rest at all. It is true it is a consideration which, though not valuable, is yet called meritorious, and which in many instances the Court will maintain, but not against creditors."

Consideration as between relations.

In fact, a settlement or other conveyance in favour of a near relative is open to more suspicion than one to a mere stranger, inasmuch as it is more likely to be intended, not a real transfer of property by which the donor puts it out of his own reach (*b*), but as a feigned and collusive arrangement by which it is secretly understood that the donee shall hold the property against the claims of creditors or purchasers, and still let the donor receive benefits from it (*c*).

But on the other hand, where there is no appearance of such an intention these moral considerations are not entirely disregarded in cases where the consideration is made up partly of value and partly of love and affection (*d*). It cannot be considered per se a mark of fraud that in entering into a contract with a relation a man has given him better terms than he would to a mere stranger (*e*).

Rosher v. Williams.

In *Rosher* v. *Williams* (*f*) the modern rule for deciding whether a settlement made between relations is for value or voluntary was thus stated by Malins, V. C.: —"If between a father and husband and wife, or parent and child, or in any way whatever an instrument is executed which ordinarily is called a voluntary settlement, and it turns out that, instead of being purely

(*y*) Section 6, ante, p. 84.
(*z*) 3 Bac. Abr. 31; 1 Fonbl. Eq. 271; 3 Rep. 80 b; *Johnson* v. *Legard*, 6 Mau. & S. 60.
(*a*) 1 Cox, 278, 280.
(*b*) Ante, pp. 56, 81.
(*c*) *Twyne's Case*, 3 Rep. 81 b; *Cornish* v. *Clark*, L. R. 14 Eq. 184; *Cracknall* v. *Janson*, 11 Ch. D. 1.
(*d*) *Persse* v. *Persse*, 7 Cl. & F. 279, 318, West, Ap. C. 110, 141; *In re Johnson*, 20 Ch. D. 389, S. C. 51 L. J. Ch. 503; ante, pp. 82, 83.
(*e*) *Moore* v. *Crofton*, 3 J. & Lat. 443; and see *Jones* v. *Marsh*, Ca. t. Talb. Forr. 64; *Myers* v. *Duke of Leinster*, 7 Ir. Eq. R. 146; 164.
(*f*) L. R. 20 Eq. 218.

voluntary, any consideration whatever was paid or [* 247] * given, or any benefit rendered to the grantor, even such an agreement to relieve the grantor from the immediate payment of a debt as in *Bayspoole* v. *Collins* (*g*), the Court will anxiously lay hold of any circumstances, constituting a consideration moving from the grantee to the grantor, to take a case out of the category of voluntary settlements." So when a *bonâ fide* and honest instrument is executed for which valuable consideration is given, and the instrument is one between relatives, the Court cannot say that the difference between the real value of the estate and the consideration given is a badge of fraud (*h*).

In honest transactions the amount of consideration not strictly looked at.

Where it is found that the transaction at issue is on the whole fair and honourable, and not induced by the fraudulent intention of defeating creditors or purchasers, the Court is not very particular as to the amount of the consideration (*i*); if it is valuable, and not so entirely inadequate as from its insufficiency to induce the presumption of fraud, it is enough. If there is any valuable consideration for a settlement, the quantum of such consideration is of no consequence under 27 Eliz. c. 4 (*k*).

The smallness of the consideration is not a matter the Court will go into, except so far as it is evidence that the transaction was a sham (*l*), and it will not "weigh considerations in diamond scales" (*m*).

(*g*) L. R. 6 Ch, 228.

(*h*) *In re Johnson*, 20 Ch. D., per Fry, J., 397; ante, p. 83.

(*i*) As against purchasers, see *Roe* d. *Hamerton* v. *Milton*, 2 Wils. 356; *Jones* v. *Marsh*, Ca. t. Talb. Forr. 64; *Doe* v. *Rolfe*, 8 A. & E. 650, 672; *Fitzmaurice* v. *Sadlier*, 9 Ir. Eq. 595, 611; *Ford* v. *Stuart*, 15 Beav. 493; *Hewison* v. *Negus*, 16 Beav. 594; *Townend* v. *Toker*, L. R. 1 Ch. 446; *Atkinson* v. *Smith*, 3 De G. & J. 186; *Bayspoole* v. *Collins*, L. R. 6 Ch. 228; and as against creditors, *Stephens* v. *Olive*, 2 Bro. C. C. 90; *King* v. *Brewen*, ibid. 93, n.; *Stiles* v. *Attorney-General*, 2 Atk. 152; *Nunn* v. *Wilsmore*, 8 T. R. 529; *Copis* v. *Middleton*, 2 Mad. 430; *Jones* v. *Boulter*, 1 Cox, 288; *Hobbs* v. *Hull*, 1 Cox, 445; *Thompson* v. *Webster*, 4 Drew. 632, S. C. 4 De G. &J. 600; *Pott* v. *Todhunter*, 2 Coll. 76; *Holmes* v. *Penney*, 3 K. & J. 90; *Myers* v. *Duke of Leinster*, 7 Ir. Eq. 146, 164; *Grogun* v. *Cooke*, 2 Ball & B. 234; *Wakefield* v. *Gibbon*, 1 Giff. 401; *In re Johnson*, 20 Ch. D. 389, S. C. 51 L. J. (N.S.) Ch. 503.

(*k*) *Price* v. *Jenkins*, 5 Ch. D. at p. 621; *In re Foster and Lister*, 6 Ch. D. 89, post, pp. 290 et seq.; and see *Lee* v. *Mathews*, L. R. 6 Ir. C. L. 530.

(*l*) Per Sir W. M. James, V.C., in *Bayspoole* v. *Collins*, 18 W. R. 730.

(*m*) Per Lord Talbot (Forr. 64), as quoted by Wilmot, C.J., in *Roe* v. *Milton*, 2 Wils. 358, n.

A simple purchase by a stranger for money paid cannot be set aside at the suit of creditors or purchasers unless there is such inadequacy as to induce the presumption of collusion, or such, in *fact, as [*248] might have invalidated the sale as between the vendor and purchaser, without the interposition of creditors or purchasers (*n*). It was said by the Court in *Bolton* v. *Madden* (*o*), "the adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the Court when it is sought to be enforced." So Lord Westbury laid down the rule in *Tennent* v. *Tennents* (*p*): "It is true that there is an equity which may be founded upon gross inadequacy of consideration. But it can only be where the inadequacy is such as to involve the conclusion that the party did not understand what he was about, or was the victim of some imposition."

Since the Sale of Reversions Act, 1868 (31 Vict. c. 4), it is conceived the rule as to inadequacy of price in sales of reversions is the same as with regard to estates in possession (*q*).

Real question, Is consideration valuable?

Apart from this, the question is, in all manner of conveyances and settlements, not whether the consideration is adequate, but whether it is valuable (*r*), so as to satisfy the words of the respective statutes. The Court is not, however, tied down by the exact words of the statutes so as to be compelled to hold every consideration which appears to be valuable good against creditors or purchasers. So where it sees a consideration

(*n*) Although it is laid down that mere inadequacy of price will not of itself make a sale invalid as between the vendor and purchaser (*Harrison* v. *Guest*, 6 De G. M. & G. 424, 8 H. L. C. 481), yet where there are other suspicious circumstances it may undoubtedly do so: see *Clarkson* v. *Hanway*, 2 P. Wms. 202; *Wood* v. *Abrey*, 3 Mad. 417; *Davies* v. *Cooper*, 5 My. & Cr. 270; *Clark* v. *Malpas*, 31 Beav. 80, S. C. 10 W. R. 613, 677; *Baker* v. *Monk*, 33 Beav. 419; Kerr, Fraud and Mistake, 2nd ed. 160. And it may be said that in this class of cases the mere fact of the conveyance having been ostensibly a sale for full consideration, while the consideration was in fact grossly inadequate is of itself evidence of fraud. A deed made on fictitious consideration cannot be supported on the ground of natural love and affection: see *Willan* v. *Willan*, 2 Dow. 274; *Bridgman* v. *Green*, 2 Ves. 627, Wilm. 58, 2 Com. Dig. 640; *Bowen* v. *Kirwan*, Ll. & G. t. Sug. 47, 66.

(*o*) L. R. 9 Q. B. 57.

(*p*) L. R. 2 H. L. Sc. 6.

(*q*) See Fry, Sp. Pf. 2nd ed. ch. 7; notes to *Chesterfield* v. *Janson*, Wh. & Tu. L. C. 6th ed. vol. 1, 686 et seq,

(*r*) *Basset* v. *Nosworthy*, Finch, 102.

is made up with a view to defraud creditors, the Court will lean againt it and reduce it to what is just and equitable (*s*),

As against purchasers, under 27 Eliz. c. 4, the question whether a settlement is voluntary or not is fre- [* 249] quently the only question that * has to be decided; for that is frequently the test whether a transaction is or is not fraudulent.

As the fraud under this statute is more purely statutory and constructive than that under 13 Eliz. c. 5, the Courts have been at least equally lenient in allowing the validity of conveyances, and have upheld them upon (if anything) slighter considerations than those which are necessary against creditors. A man indebted who sells his property ought to get a fair return, so as to keep the same amount of property for payment of his debts (*t*), whilst, as between a purchaser of land and a person claiming under a prior title, the question is, which has the best right, and if the first gave *any* consideration the conveyance to him is not likely to be "infected with the doctrine of voluntary conveyances" (*u*).

Legal obligation the only test.

An act which the doer could have been compelled to do cannot in general be regarded as voluntary. A legal obligation to make a provision for wife or family is sufficient to support a settlement on them (*v*). It is not the spontaneous act of the settlor, and the intention is taken to have been to do that which he might have been compelled to do, not to defeat his creditors; but no other considerations, of the good of science or learning, and no moral obligation, however strong, can make a valuable consideration (*w*). This is clearly exemplified by the case of *Gilham* v. *Locke* (*x*), in which a bond given by a man since bankrupt was held voluntary. It appeared that some time after the bankrupt's marriage with L. it was discovered that he had, at the time of

(*s*) Lord Hardwicke, in *Blount* v. *Doughty*, 3 Atk. 485; see *Bowen* v. *Kirwan*, Ll. & G. t. Sug. 47, 65–6; *Levy* v. *Creighton*, 22 W. R. 605.

(*t*) See *In re Johnson*, 20 Ch. D.. per Fry, J., 397; ante, p. 82.

(*u*) Per Wilmot, C.J., in *Roe* v. *Mitton*, 2 Wils. 358, note to 3rd ed., speaking probably of *Jones* v. *Marsh*, Ca. t. Talb. Forr. 64; *In re Foster and Lister*, 6 Ch. D. 87.

(*v*) See ante, p. 244; post, pp. 297 et seq.

(*w*) *Keenan* v. *Handley*. 2 D. J. & S. 283; *Thompson* v. *Webster*, 4 Drew. 632; *Stiles* v. *Attorney-General*, 2 Atk. 152; post, p. 255; and see *Goldsmith* v. *Russell*, 5 De G. M. & G. 547, 555; ante, p. 54.

(*x*) 9 Ves. 612.

contracting that marriage, a wife living, and to make L. some compensation he gave her a bond to secure her an annuity for her life (*y*).

Ex parte Robinson.

So also where (*z*) the trustees of a marriage settlement had a right to be repaid by the husband, on his death or failure in his circumstances, £1000, which had been paid to him as his wife's fortune, and he, before the event, had, on the application of the *trustees, secured the £1000 by mortgage. On the husband's bankruptcy his assignees disputed the mortgage. Lord Chancellor Hart said the question was, whether the contract was such as that the husband was compellable, on a bill filed adversely, to do what he did, and neither of the contingencies on which he covenanted to pay having occurred, the trustees could not have acted adversely so as to compel payment, and therefore the mortgage was void against the creditors as a nudum pactum. [* 250]

Settlement in respect of money of wife acquired by husband for value.

But where a man on his marriage acquired (*a*) money through his wife, and contracted in her favour in the event of his bankruptcy, or created a trust of his property to take effect in that event, to the extent of her money, such contract or trust, to the extent of such money, was deemed to have been made for valuable consideration, and therefore to be good against his creditors (*b*).

When a loan is good consideration.

A mere advance by way of loan is, of course, sufficient consideration for a conveyance by way of security; and even if secured by a mortgage may sometimes amount to a valuable consideration for a settlement where it has been advanced bonâ fide by one ignorant of the debts, on the express condition of the settlement of other property being made (*c*). So, too, where the advance forms part of an arrangement dealing with mixed interests, which could not otherwise have been effected (*d*); and although the person advancing the money does not occupy the position of a trustee or a relation, as a settlement on children or wife in consideration of a loan by a third person (*e*).

(*y*) See also *Matthews* v. *L——e*, 1 Mad. 558.
(*z*) *Ex parte Robinson*, 1 Moll. 291.
(*a*) But see now the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 1, 2, 5.
(*b*) *Ex parte Young*, Buck, 187; and see the Bankruptcy Act, 1883 (46 & 47 Vict. c. 54), s. 47.
(*c*) *Thompson* v. *Webster*, 4 Drew. 628, S. C. 4 De G. & J. 600.
(*d*) *Nunn* v. *Wilsmore*, 8 T. R. 521.
(*e*) *Ford* v. *Stuart*, 15 Beav. 493; *Bayspoole* v. *Collins*, L. R. 6 Ch. 228; and see *Wheeler* v. *Caryl*, 1 Amb. 121; post, p. 297.

Holmes v. *Penney.*

In *Holmes* v. *Penney* (*f*) A. being entitled to a life interest in a sum of Consols, and being deeply indebted, his brother agreed to pay all debts not charged on A.'s life interest, on condition that the life interest should be settled so as to be applicable to the maintenance of A., his wife and children, or any of them, at the absolute discretion of the trustees. It appeared that the [* 251] brother had done *his best to find out all A.'s debts, but there was one then owing to the plaintiff which he did not hear of. It was held that the settlement was good against the plaintiff's debt as being on valuable consideration.

Bayspoole v. *Collins.*

In *Bayspoole* v. *Collins* (*g*) (decided under 27 Eliz. c. 4), A. C. was owner of property subject to a mortgage, the interest on which was in arrear, and the mortgagees had given notice to the tenants to pay their rent to them, and threatened to exercise their power for sale. Under these circumstances, A. C.'s solicitor agreed to advance to A. C., on his note of hand, sufficient money to pay the interest and other outstanding debts, on condition of his settling the property, subject to the mortgage, on his wife and children, which he accordingly did. This settlement was held good against a subsequent mortgagee of the settlor. Lord Hatherley, L.C., there said: "Now, it is not for me to say whether the mode by which the Court has attempted to remedy some of the evils of this state of the law—namely, by holding that a small and inadequate consideration is sufficient to support such a settlement under the statute of Elizabeth—has diminished the evil of the mischief. But so it is, that a very small consideration is admitted to be sufficient. If this bargain which is alleged to have been entered into is established, then we have this fact, that, in consideration of an advance of £150 to the settlor, he agreed to execute this settlement upon his wife and children. That being the case, the authorities are sufficient to shew that such a consideration, although, merely by way of loan secured by a promissory note, is adequate to support such a settlement."

Pott v. *Todhunter.*

Under this head may be classed the case of *Pott* v. *Todhunter* (*h*), which was a case of an inoperative will, in order to effect the fulfilment of which a friend of the family, under difficult circumstances, effected an ar-

(*f*) 3 K. & J. 90.
(*g*) L. R. 6 Ch. 228.
(*h*) 2 Coll. 76; post, p. 278.

rangement with all the persons interested, and by his tact and management secured to A. B., a married woman, the property which was intended for her by the invalid will. He did all this on the express agreement and understanding that, with regard to such personal estate as should be procured * generally by [* 252] these arrangements, he should have power to make such settlement upon A. B. and her family as he should think fit. The settlement on them having been executed, it was upheld against the husband's creditors, although the property was before the settlement vested in him as administrator, he having, in order to further the above arrangements, taken out administration to the estate.

Existing debt.

A pre-existing debt, although a good and valuable consideration (*i*), is not in general so good a consideration as money actually paid at the time, even under the statutes of Elizabeth, because it partakes more of the nature of a preferential payment of the debt than a fair sale (*k*). Under the Bankruptcy Acts it is one which is naturally viewed with still greater suspicion, for their object is to pay all the creditors rateably, and any conveyance in satisfaction of a debt is prejudicial to that arrangement (*l*).

Security for debt.

A conveyance by way of *security* for a pre-existing debt comes under the same category (*m*).

Fresh advance aliter.

A conveyance made to secure a loan (*n*), or a further advance (*o*) made at the time of the execution of the deed, stands on a different footing, for then the debtor gets an equivalent for some part of the property, and that remains subject to the claims of creditors. But then the question arises, whether the new advance was

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(*i*) *Twyne's* v. *Case*, 3 Rep. 80 b; *Belcher* v. *Prittie*, 10 Bing 408.

(*k*) See *Martin* v. *Willyams*, 20 L. T. (N.S.) 352; ante, pp. 131 et seq.; *Holbird* v. *Anderson*, 5 T. R. 235; *Plumb* v. *Flintt*, 2 Anstr. 439, 440; and other cases, ante, pp. 104 et seq.

(*l*) See ante, pp. 12, 100 et seq.

(*m*) *Oriental Banking Co.* v. *Coleman*, 3 Giff. 11; *Smith* v. *Cannan*, 2 E. & B. 35; *Woodroffe* v. *Johnston*, 4 Ir. Ch. 319; *Ex parte Hodgkin*, L. R. 20 Eq. 746; *Ex parte Field*, 13 Ch. D. 106, n.; ante; pp. 94 et seq.

(*n*) *Pennell* v. *Reynolds*, 11 C. B. (N.S.) 709; *Hutton* v. *Cruttwell*, 1 E. & B. 15, 21; *Harris* v. *Rickett*, 4 H. & N. 1; see also *Cook* v. *Walker*, 3 W. R. 357.

(*o*) *Holmes* v. *Penney*, 3 K. & J. 90; *Weaver* v. *Joule*, 3 C. B. (N.S.) 309.

substantial, or was merely a small sum paid to give a shew of consideration to the transaction (*p*).

Continuance of rent, &c.

[*253] *The continuance of the rent reserved by the former lease is a good consideration for a promise to grant the lease in reversion (*q*), but the consideration of money already laid out is no consideration for the promise to renew a lease, and money afterwards laid out will make no difference (*r*); and of course the giving up of his tenancy by a tenant at will is no consideration (*s*). In *Owen* v. *Owen* (*t*) it was held that a lease at £10 a year, to commence at the death of the lessor of property worth £27 a year, was a good consideration against a mortgagee (*u*).

Promise not to apply for costs good.

But not promise as to proceedings in bankruptcy.

It has been decided that a promise by a plaintiff not to apply for costs in bankruptcy, to which he had a contingent right, if the judge chose to give them to him, is a sufficient consideration for a promise of the defendant to pay those costs (*v*). But a promise to conduct proceedings in bankruptcy so as to injure as little as possible the debtor's credit is not a good consideration to support a contract (*w*).

Compounding prosecutions.

Forbearing to prosecute for obtaining money by false pretences is an illegal consideration (*x*), and so is every compromise of a prosecution for a felony (*y*) or a misdemeanor of a public nature (*z*); but a satisfaction for an injury of a private nature or the compromise of a misdemeanour of a private nature is in general a good consideration (*a*).

(*p*) See *Ex parte Bailey*, 3 De G. M. & G. 534; *Young* v. *Waud*, 8 Ex. 221; *Hale* v. *Allnutt*, 18 C. B. 505; *Graham* v. *Chapman*, 12 C. B. 85; *Bell* v. *Simpson*, 2 H. & N. 410; *Smith* v. *Timms*, 7 Jur. (N.S.) 1015; *Goodricke* v. *Taylor*, 2 D. J. & S. 135; *Lacon* v. *Liffen*, 32 L. J. Ch. 25, 315; *Lomax* v. *Buxton*, L. R. 6 C. P. 107; *Ex parte Fisher*, L. R. 7 Ch. 636; *Ex parte Hauxwell*, 23 Ch. D. 626; *Ex parte Johnson*, 26 Ch. D. 338; ante, pp. 95, 96.

(*q*) *Moore* v. *Crofton*, 3 J. & Lat. 438.

(*r*) *Robertson* v. *St. John*, 2 Bro. C. C. 146.

(*s*) *Kent* v. *Prat*, 1 Brownl. 6.

(*t*) 3 H. & C. 88.

(*u*) See also *Bainbridge* v. *Firmstone*, 8 A. & E. 743; *Wilkinson* v. *Oliveira*, 1 B. N. C. 490.

(*v*) *Bracewell* v. *Williams*, L. R, 2 C. P. 196.

(*w*) Ibid.

(*x*) *Clubb* v. *Hutson*, 18 C. B. (N.S.) 414.

(*y*) *Williams* v. *Bayley*, L. R. 1 H. L. 200; *Flower* v. *Sadler*, 10 Q. B. D. 572.

(*z*) *Coppock* v. *Bower*, 4 M. & W. 361.

(*a*) *Westby* v. *Westby*, 2 D. & War. 519; post, pp. 310, 311.

Consideration of judgments tried or confessed.

The consideration for a judgment which is obtained by a point tried need not be proved, but it shall be intended good (*b*); but he who upholds a judgment by confession must prove it to be for a just debt (*c*).

Promise by heir and devisee.

A promise by an eldest son to his father on his death-bed to make a provision for the younger children out of the property *left to him has been held [* 254] sufficient consideration to support a bond made in pursuance of such promise (*d*).

Indemnity.

Incurring liability for another person is a good consideration. In *Worsley* v. *Demattos* (*e*), Lord Mansfield said: "The indemnity which is the consideration of the deed in question I allow to be a good, valuable, and true consideration."

Covenant.

A covenant by a son to pay his father's debts is a good consideration (*f*). A covenant of indemnity in a settlement has been held sufficient to support it (*g*) under 27 Eliz. c. 4. So also a settlement of leaseholds is supported by the usual covenants expressly or impliedly entered into by a lessee (*h*).

In *Rosher* v. *Williams* (*i*) a conveyance of real estate otherwise voluntary contained a covenant by the grantee under specified circumstances to build on part of the estate conveyed. The conveyance contained no shifting clause or provision for defeasance if the covenant was not peformed. It was held by Malins, V.C., that as no consideration was shown moving from the grantee to the grantor, and as the covenant was only to commence to build, and not to commence and finish, and was not one to which a penalty attached, it raised no consideration for the deed under 27 Eliz. c. 4.

Voluntary instruments, unless obtained by fraud, are good between the parties to them and all other persons,

(*b*) *Keenan* v. *Handley*, 2 D. J. & S. 283.
(*c*) *Sanders* v. ———, Holt, 327.
(*d*) *Eales* v. *Gee*, Barn. Ch. 397.
(*e*) 1 Burr. 474; *Skidmore* v. *Bradford*, L. R. 8 Eq. 1.
(*f*) *Scott* v. *Scott*, 18 Jur., per Lord Cranworth, L.C., 758.
(*g*) *Townend* v. *Toker*, L. R. 1 Ch. 446.
(*h*) *Horrocks* v. *Rigby*, 9 Ch. D. 183, 184; and see *Price* v. *Jenkins*, 5 Ch. D. 619; infra, pp. 257 et seq.; Dav. Prec. 4th ed. vol. 2, pt. 1, p. 419, note (*d*).
(*i*) L. R. 20 Eq. 210; and see *Mullins* v. *Guilfoyle*, 2 L. R. Ir. 108–109.

Giving up a benefit voluntarily conferred in exchange for something a valuable consideration.

except those as against whom the statutes of Elizabeth make them void, and, subject to the rights of creditors for value, voluntary creditors have a debt which they can enforce (*k*); and upon this it seems is founded the principle, that if a man gives up what has been given to him voluntarily, and receives something in exchange, the giving up the first gift is a valuable consideration.

Ex parte Berry.

[* 255] *In a case of this kind (*l*) a voluntary bond was given up to the obligor of it before his bankruptcy, and, in consideration of the surrender, a second bond on which proof was tendered was given. Lord Eldon said it was a hard case; the first bond was clearly good between the obligor and obligee, and payment of it might have have been enforced. The obligor, instead of payment, gives another bond which was not voluntary; being given upon cancelling the other security. If there is mala fides or a fraudulent intention in the sense of attempting to substitute an available security for one that could not avail against creditors, it is otherwise; but a voluntary bond, being good between the parties, if that security by which the obligor might have been compelled long before his bankruptcy to pay is given up for another security, the security so substituted is not voluntary, but stands on a sufficient consideration.

Stiles v. *Attorney-General.*

In *Stiles* v. *Attorney-General* (*m*) the Duke of Wharton had made two gifts of annuities to Dr. Young, which were disputed by judgment creditors. The first annuity was expressed to be in consideration that the public good is advanced by the encouragement of learning and the polite arts, and of the Duke's being pleased with Dr. Young's attempts therein, and in consideration likewise of the love he bore him.

The second annuity was in consideration of the Duke being indebted to Dr. Young in the sum of £350, and of his leaving Lord Exeter's service and thereby losing an annuity of £100 which Lord Exeter had before agreed to settle on him if he stayed as tutor. As to the first annuity, Lord Hardwicke thought it was not a

(*k*) See ante, pp. 68 et seq., 208, 209; post, pt. v. ch. iii. et seq.; *In re Walhampton Estate*, 26 Ch. D. 391.

(*l*) 19 Ves. 219. See also *Nixon* v. *Hamilton*, 2 D. & Wal. 364, 381, *Meggison* v. *Foster*, 2 Y. & C. Ch. 336; *Barnes* v. *Hedley*, 2 Taunt. 184; *Fitzmaurice* v. *Sadlier*, 9 Ir. Eq. 595; *Stiles* v. *Attorney-General*, 2 Atk. 152, et infra.

(*m*) 2 Atk. 152.

legal consideration; for though it may be a very good inducement to a person for his doing it, yet it will not amount to a valuable consideration in the eye of the law; but then it appeared that in order to accept the first annuity Dr. Young was obliged to give up the annuity offered him by Lord Exeter, and this Lord Hardwicke said certainly amounted to a valuable consideration. For it has been truly said it will equally arise where a person gives up a *certain pecuniary [* 256] advantage at the time of the grant as where a sum of money is actually paid down at the time.

And though the grant of the first annuity might be voluntary if taken singly, yet the recital in the second will alter the nature of it and turn it into a valuable consideration; for, as there were arrears on the first, there is no doubt but this was a just and legal debt and the promising not to sue for those arrears was a good consideration, and from that time the first anuuity ceased to be a voluntary grant.

Another bond, given to Dr. Young in consideration of his being at a very great expense when he was a candidate for a seat in Parliament, was held quite voluntary.

Two propositions (confirmed by subsequent cases) may be deduced from this case :

Giving up a pecuniary advantage.

1. The giving up of a pecuniary advantage is as good and valuable a consideration as money paid, although the advantage given up would only have been in return for services rendered or work done (*n*); and this seems seems to be what is meant by saying that loss is as good a consideration as profit (*o*).

Arrears of voluntary annuity.

2. Where an annuity secured by a voluntary instrument falls into arrears, a fresh security given for those arrears will be supported against creditors or purchasers; for the instant the arrears accrue they are, as between the obligor and obligee, a debt for which the obligor might immediately be sued, and being a debt, and as sufficient as a debt for valuable consideration, may be dealt with as such, and any transaction founded upon that—whether a bond for the arrears or the

(*n*) *Townend* v. *Toker*, L. R. 1 Ch. 460 ; see also *Lady Mary Herbert* v. *Earl Powis*, 1 Bro. P. C. by Toml. 355.

(*o*) 1 Ch. Ca. 74.

arrears given up and something given in lieu of them—will be for valuable consideration (*p*).

Assignment of leaseholds for value under 27 Eliz. c. 4.

The question whether an assignment of leaseholds can ever be voluntary under 27 Eliz. c. 4, or whether there is always an express or implied consideration moving from the assignee, according as he does or does not expressly covenant to pay the rent and perform [* 257] *the covenants of the lease, has been the subject of several recent decisions.

Price v. *Jenkins.*

In *Price* v. *Jenkins* (*q*) leaseholds were assigned by a settlement made in contemplation of re-marriage to trustees on certain trusts after payment of all out-goings. The trustees did not covenant to pay the rent or perform the covenants of the lease. James L.J., said: "The trustees came under a responsibility for payment of rent and performance of the covenants of the lease. It might be such a responsibility that a lessee might be actually willing to pay money to get rid of. If there is any valuable consideration for a settlement the quantum of such a consideration is of no consequence under the statute of Elizabeth. I think that here there was a valuable consideration sufficient to support the settlement against a subsequent purchaser."

The principle of the decision in this extreme case seems to shew that an assignment of leaseholds must *always* be for value under the statute of 27 Eliz. c. 4. For, in this case the first trust was for payment of all out-goings, and it was not alleged that any liability attached to the trustees, who were bound by no *express* covenant, but only by the implied obligation to perform the covenant in the lease (*r*). This seems to have been the view of Bacon, C.J., in *Ex parte Doble* (*s*), where the assignment of leaseholds was in consideration of an annuity of £50 a year. It did not appear whether the lease did or not contain a covenant not to assign without the licence of the lessor. The assignment was held valid. Bacon, C.J., said: "Whether the lease contained a covenant against assignment or not would not

Ex parte Doble.

(*p*) *Gilham* v. *Locke*, per Sir W. Grant, M. R., 9 Ves. 614; *Ex parte De Grouchy*, 3 Mont. & A. 27; see also *Greaves* v. *Houlditch*, 2 Price, 147.

(*q*) 5 Ch. D. 619; but see *Thomas* v. *Thomas*, 2 Q. B. 851.

(*r*) See Dav. Prec. 4th ed. vol. 2, pt. 1, 419, note (*d*); and comments of Hall, V.C., in *Trowell* v. *Shenton*, 8 Ch. D. 321.

(*s*) 26 W. R. 407, affirmed on appeal; and see *Ex parte Hillman*, 10 Ch. D. 624.

affect my decision. It has been stated in the Court of Appeal in the case of *Price* v. *Jenkins* (*t*), and such statement is binding on me, that if no fraud can be proved the assignment of a lease is always for valuable consideration."

In *Horrocks* v. *Rigby* (*u*), Lord Justice Fry (then Mr. Justice Fry), following *Price* v. *Jenkins* (*t*), held that a covenant by an * assignee of leaseholds [* 258] to pay the rent and perform the covenants of the original lease was a valuable consideration.

In *In re Ridler* (*v*), a case decided under 13 Eliz. c. 5, the case of *Price* v. *Jenkins* (*t*) was again discussed by the Court of Appeal. Cotton, L.J., there said: "It has been decided under the statute of 27 Eliz. c. 4, that a voluntary conveyance, though honestly and fairly made, was fraudulent as against a subsequent purchaser from the settlor. *Price* v. *Jenkins* (*t*) qualified that doctrine, and decided that the grantee's undertaking the liability for rent was sufficient to support a settlement which was open to no objection but that of being voluntary. It is a decision of this Court, and we have not to consider whether it was right or wrong, for we are bound by it." *In re Ridler.*

But in the recent case of *In re Marsh and Earl Granville* (*w*), Bowen, L.J., seems to have accepted the decision in *Price* v. *Jenkins* (*t*) in its widest sense. It was, he said, a case in which there was an assignment of leasehold property with a liability to perform certain covenants attached to it, and it was held that the assignment was therefore a conveyance for valuable consideration.

The conclusion from these cases seems to be that *any* assignment of leaseholds can be supported under 27 Eliz. c. 4, as against a subsequent purchaser, *merely* because of the express or implied responsibility which the lessee comes under by virtue only of the assignment.

In the Irish Courts, however, under the correspond-

(*t*) 5 Ch. D. 619. (*u*) 9 Ch. D. 183, 184. (*v*) 22 Ch. D. 74, 82.
(*w*) 24 Ch. D. 11, 25; and see *Re Lulham*, 32 W. R. 1013, affirmed on a different point, 33 W. R. 788; Coote, Mortgages, 5th ed. 580, 587; and *In re Foster*, 54 L. J. (N.S.) Ch. 73; and see *Green* v. *Paterson*, 32 Ch. D., per Cotton, L.J., 104.

Price v. *Jenkins* not fully followed in Ireland.

ing Act of 10 Car. 1, sess. 2, c. 3, the decision in *Price* v. *Jenkins* (*b*) has been reviewed and not followed to its full extent.

In *In re Greer* (*z*) it was held that an assignment of leaseholds subject to a substantial rent and to onerous covenants undertaken by the assignee was not voluntary.

But in the case of *Lee* v. *Mathews* (*a*), decided in the [* 259] Irish Court * of Appeal in 1880, where the assignment of a lease subject to a rent of £1 10*s*. yearly was in consideration of 5*s*. and natural love, and the deed contained no covenant by the assignee, the principle of the decision in *Price* v. *Jenkins* (*b*) was dissented from, and the deed was held voluntary.

It was there said by Chief Justice May that the decision in *Price* v. *Jenkins* (*b*) amounted to the simple legal axiom that no assignment of a leasehold subject to any rent could possibly be voluntary, so as to be invalid against a subsequent sale for value, irrespective of the amount of rent and value of the property. The real question, it was said, is, Was the dealing with the property a bargain, or a gift? A gift of a valuable interest in land is not the less a gift because the property so given carries with it certain obligations. The gift is diminished, but its character is not changed.

Conveyance of freeholds *and* assignment of leaseholds, whether voluntary under 27 Eliz. c. 4.

It has not been expressly decided whether a settlement which is both a conveyance of freeholds and also an assignment of leaseholds can be supported as for value under 27 Eliz. c. 4, either wholly, or only as to the leaseholds, *merely* because the assignee becomes liable to pay the rent and perform the covenants of the lease; this seems to depend in a great degree on the relative value of the freehold or leasehold properties. In such a case, it will be observed, there is no question of fraud; the effect of upholding the settlement as for value is merely to destroy the settlor's power of selling the property by virtue of that statute (*c*).

(*z*) 11 Ir. R. Eq. 502.

(*a*) L. R. 6 Ir. 530; and see *Gardiner* v. *Gardiner*, 12 Ir. C. L. 365, where an express covenant in an assignment of leaseholds per se was held not to be a valuable consideration; followed also in *Hamilton* v. *Molloy*, 5 L. R. Ir. 339; *Rorke's Estate*, 15 Ir. Ch. R. 327.

(*b*) 5 Ch. D. 619.

(*c*) *In re Ridler*, 22 Ch. D. 81, 82; *In re Marsh and Earl Granville*, 24 Ch. D. 11, 18, 21, 25, 26; *In re Lulham*, 32 W. R. 1013, S. C., affirmed on a different point, 33 W. R. 788.

Good consideration *not always same* under both statutes of Elizabeth.

The question what is a good consideration under 13 Eliz. c. 5, and what is a good consideration under 27 Eliz. c. 4, it will be seen, is not always the same.

So in *Price* v. *Jenkins* (*d*) a principle was laid down applicable only to settlements of leaseholds liable to be impeached under 27 Eliz. c. 4; but this principle does not apply to such settlements if only liable to be impeached by creditors under 13 Eliz. c. 5.

In re Ridler.

This important distinction was clearly pointed out in *In re Ridler* (*e*) by Jessel, M.R., who said that, treating *Price* v. *Jenkins* (*b*) *as well decided, it [*260] had no bearing on cases under 13 Eliz. c. 5. He there examined the meaning of the term "good consideration" in the exception in 13 Eliz. c. 5 (*f*). That term could not mean that, if some obligations attaching to the property went to the new owner in exoneration of the settlor, that made the conveyance a conveyance for value. Cotton, L.J., pointed out that the decision in *Price* v. *Jenkins* (*b*) on 27 Eliz. c. 4, did not touch the question whether a settlement was or was not made with intent to defeat or delay creditors. The mere fact that the grantee in a conveyance of leaseholds became liable for the rent would not bring a conveyance of leaseholds made for no consideration within the exception in 13 Eliz. c. 5 (*f*), as made for good consideration.

Family arrangements.

The real difficulty on this subject arises in questions on family provisions and settlements, and mutual arrangements by persons having interests in the property settled, where their relative positions with regard to it, or other considerations arising between the parties, lend their aid to the equitable consideration which is said to attach to such settlements as are made in the discharge of a moral obligation or as the provision for a family (*h*).

Limitations in marriage settlements.

Where the limitations impeached as voluntary form part of a settlement founded on the consideration of marriage, it frequently happens that, although they do not come directly within, and are not properly speaking

(*d*) 5 Ch. D. 619; and see *Ex parte Hillman*, 10 Ch. D. 624, 626.
(*e*) 22 Ch. D. 74; and see *Green* v. *Paterson*, 32 Ch. D., per Cotton, L.J., 104, 105.
(*b*) 5 Ch. D. 619.
(*f*) Section 6.
(*h*) *Rigden* v. *Vallier*, 2 Ves. 258.

supported by, the valuable consideration of marriage, yet the marriage is the primary and ostensible object of the settlement. Whether certain limitations in it are therefore to be upheld as for value, or are supported by other considerations arising concurrently with that of the marriage, or are merely outside limitations unsupported by it, and therefore voluntary, are questions intimately connected with the subject of the extent and nature of the marriage consideration, which will be discussed hereafter (*i*).

Slightly different.

The principle, too, is somewhat different; for, as was said by Baron Eyre in *Jones* v. *Boulter* (*k*), distinguishing that case (in which a wife gave up her dower) from *Roe* v. *Mitton* (*l*), and cases on the extent of the mar- [*261] riage consideration, "The truth is, that *when something was given up by the parties, that must necessarily extend to all the limitations; where marriage only is considered, they may be fairly and naturally restrained."

Bonâ fide settlements *not* on marriage.

It is proposed, then, to consider what post-nuptial and other family settlements, *not made on marriage*, are voluntary, and what can be upheld against creditors or purchasers as founded on valuable consideration; and for that purpose the inquiry will be limited to bonâ fide settlements.

Individual cases on the subject must generally depend on their own particular circumstances, and the record of them is only of practical utility where they go towards establishing principles which are of general application (*m*). The precedents on this point actually decided on the statutes of Elizabeth are comparatively few, but the question whether a contract is voluntary or not is often at issue independently of these statutes.

Question of voluntary or not arises in cases of specific performance.

The Court, for instance, will not specifically enforce agreements which are voluntary (*n*); and often, in deciding whether an agreement is or is not voluntary, for the purposes of specific performance, acts on the same principle as are applicable to cases on these stat-

(*i*) Post, pt. iv. ch. iv.
(*k*) 1 Cox, 296..
(*l*) 2 Wils. 356.
(*m*) *Corlett* v. *Radcliffe*, 14 Moo. P. C. 121.
(*n*) See post, pt. vi. ch. i.

utes (*o*). It may be stated that, except in a few cases of family arrangements (*p*), contracts which would have been enforced between the parties will be good against purchasers or creditors.

In *Myddleton* v. *Kenyon* (*q*), before Lord Loughborough, A., having an estate in fee of £6000 a year in value, and being also tenant for life without impeachment of waste of another estate of the annual value of £5000, with the reversion in fee after an estate tail in B., his only son by a former marriage, became greatly indebted by mortgage, annuities, and otherwise, to the amount of £100,000. A. and B. joined in conveying both estates to trustees, upon trust by sale or mortgage, or by sale of the timber, or out of the rents and profits to pay debts, and to apply so much of the rents and profits of what should remain unsold as they should think proper as a sinking fund, and to pay the residue to A., and to * settle the remaining trust es- [* 262] tates (subject to an annuity of £1000 to B. for the joint lives of him and A.) upon A. for life, without impeachment of waste, with power to lease for twenty-one years only, remainder to trustees to preserve, &c., remainder (subject to a jointure to the wife of A. and to portions for children) to the joint appointment of A. and B., and, in default thereof, to the appointment of B. surviving, and in default thereof to B. in tail male, remainders to the other sons of A. in tail male, remainder to B. in tail general, remainder to the daughters of A. in tail with cross remainders, remainder to B. in fee, with powers of leasing and full powers of management in the trustees. *Myddleton* v. *Kenyon.*

On a bill filed by A. to be relieved against this settlement, one of the grounds taken by the counsel for the plaintiff was the want of consideration, A. having been deceived in a notion of the expediency of his son's co-operation, whereas in truth he was perfectly competent, out of the unsettled estate, to effect all the purposes of the arrangement without his son; but that, although the son's joining was no effective accommodation, he, the son, had been a most disproportionate gainer by the transaction without any sacrifice or concession on his part. But the Lord Chancellor decided that, as to the alleged want of value to support the set-

(*o*) *Ford* v. *Stuart*, 15 Beav. 501; Fry, Sp. Pf. 2nd ed. 193, 194.
(*p*) See post, pp. 272 et seq.
(*q*) 2 Ves. Jun. 391.

tlement, there was no colour for that imagination ; there was consideration enough to support the deed at law against creditors or purchasers, and there was consideration enough, not only to support the beneficial limitations of the estates to his son, but all the other limitations in which the father was concerned.

Concurrence of party with *some* interest a valuable consideration.

It may be considered an established principle that, if a person whose concurrence the parties think essential join in a settlement, his concurrence will be deemed a valuable consideration, although he did not substantially part with anything (*r*). The consideration depends, not so much on whether the concurrence passed any interest, as on whether it enabled a settlement to be made which could not otherwise have been effected (*s*).

Concurrence of feme covert.

[* 263] *So even the concurrence of a married woman has been held to be a valuable consideration with respect to property settled to her separate use, without power of anticipation; for it enured to release the trustees from all claims as to past income, though she could not pass or affect any future interest (*t*).

Myers v. *Duke of Leinster.*

In a case (*u*) before the Lord Chancellor of Ireland (*v*) two separate estates were the subject of a family settlement. Of one of these the father was seised in fee, subject to certain equities to which his son W. W. H. was entitled; of the other estate the father was tenant for life, with remainder to his son W. W. H. in tail. The father being embarrased, these estates were conveyed to trustees in trust to receive the rents, and thereout to pay advances then made and thereafter to be made by D. L. for payment of debts or incumbrances, and, at the request of D. L. to raise by sale or mortgage sufficient sums of money to pay D. L. what might be due him; the residue to be subject to such annuity for the father as D. L. should appoint, and to raising £30,000 for younger children (subject

(*r*) Sug. V. & P. 14th ed. 719 ; *Myddleton* v. *Kenyon*, supra : *Roe* v. *Mitton*, 2 Wils. 356 (where, although the settlement was on marriage, the same principle applies ; see post, pt. iv. ch. iv.); *Hill* v. *Bishop of Exeter*, 2 Taunt. 69 ; *Gully* v. *Bishop of Exeter*, 5 Bing. 171, 2 Moo. & P. 105, 266, 276 ; *Acraman* v. *Corbett*, 1 J. & Hem. 410.

(*s*) *Harman* v. *Richards*, 10 Hare, 81, 87.

(*t*) *Harman* v. *Richards*, 10 Hare, 81; post, p. 269.

(*u*) *Myers* v. *Duke of Leinster*, 7 Ir. Eq. R. 146.

(*v*) Sir Edward Sugden.

to restriction by D. L.), and to annuity to the son, W. W. H. during his father's life; and after the father's death, and so soon as the incumbrances and £30,000 for younger children were paid, to W. W. H. in fee. There being no evidence of mala fides, this deed was upheld against creditors of the father as a valuable bargain between father and son.

Wakefield v. *Gibbon.*

So, again, a bill by creditors of a tenant for life of real estate impeaching part of a family arrangement whereby the tenant for life surrendered his interest and assigned certain policies on his own life (subject to certain charges) to his son, in consideration of the son, who was tenant in tail in remainder, and who had previously joined with his father in raising money on mortgage for his father's benefit, paying off certain charges on the life estate and providing an annuity for his mother, was dismissed with costs (*w*).

Concurrence of necessary party only supports that for which it was given.

But the concurrence of a necessary party in a conveyance does not amount to a consideration for a limitation when, from the *interests of the parties [* 264] and from other circumstances, it is shewn not to have been made for the benefit or at the desire of such party, and that the concurrence of such party was not part of the contract (*x*).

Settlement to survivor in fee by tenant for life and remainderman.

Tenant for life and remainderman cannot resettle the estate to the survivor in fee so as to prevent them both from selling to a purchaser (*y*). So where H., tenant for life of copyhold, and B., remainderman in tail, with remainder to H. in fee, intending to join in an absolute sale to L., suffered a recovery to the use of H. for life, remainder to B. for life, remainder to the right heirs of the survivor, and then joined in conveying to L., the purchaser for valuable consideration, in fee; it was held that the contingent remainder to the survivor in fee was void against L., though, had it been good, it would not have passed to L. by the surrender (*x*).

Settlement by successive tenants in tail.

The mere fact that the grantor in a settlement was first tenant in tail under a prior settlement with remainder to the grantee in tail will not support the

(*w*) *Wakefield* v. *Gibbon*, 1 Giff. 401; and see *Bennet* v. *Bernard*, 10 Ir. Eq. R. 584.

(*x*) *Doe* v. *Rolfe*, 8 A. & E. 650.

(*y*) *Turleton* v. *Liddell*, 17 Q. B. 390; *Doe* v. *Rolfe*, 8 A. & E. 650; Sug. V. & P. 14th ed. 716.

limitation to the grantee as valuable; for he gave up no interest, and in fact had none as against the first tenant, if he chose to bar the entail (*a*).

Must be fair exchange.

There must be something like a fair interchange of interests, and the mere fact of a settlement being made by persons who have interests in the property, and of their altering those interests by the resettlement, will not necessarily make it valuable.

Tarleton v. *Lidyell.*

In *Tarleton* v. *Liddell* (*b*), under a marriage settlement, J. T. was tenant for life, with remainder to his wife for life, remainder to his first and other sons in tail, remainder to his wife's father in fee. He had several sons, and on J. C. T., the eldest, coming of age, J. T. and his wife, and J. C. T., the son, joined in a recovery and resettlement, under which the estate was conveyed to J. C. T., the son, and his heirs, during the life of J. T., the father, remainder to J. T.'s wife for life, remainder to J. C. T. for life, remainder to his first and other sons in tail male, with remainders over to the other children of J. T., to whom the ultimate remainder in fee was limited.

[* 265] By this deed, it will be seen, J. T., the father, gave up his valuable life interest in possession, and only took back remote limitations to his other children, with remainder to himself in fee. It was therefore, in fact, almost equivalent to a voluntary settlement by him of his life interest on J. C. T., the son; and as he was at the time in embarrassed circumstances the transaction was held void against his creditors as being voluntary.

In this case the resettlement by the father and son, being a fraud on the father's part against his creditors, was set aside against them. That which was the inducement to the son to execute the resettlement was taken away, and therefore, there being no other consideration, the father's fraud was held to vitiate the whole transaction, and the sons part in the resettlement —his giving up his estate tail, and taking back an estate for life, with remainder to his first and other sons in tail—was held voluntary and void against a subsequent purchaser from the son (*c*).

(*a*) *Cormick* v. *Trapaud*, 6 Dow. 860.
(*b*) 17 Q. B. 390, S. C. 4 De G. & Sm. 538.
(*c*) *Tarleton* v. *Liddell*, 17 Q. B. 390, 4 De G. & Sm. 538; Sug. V. & P. 14th ed. 719.

In *Baker* v. *Bradley* (*d*) it was said by Lord Justice Turner: "Transactions between parent and child may proceed upon arrangements between them for the settlement of property or of their rights in property in which they are interested. In such cases this court regards the transaction with favour. It does not minutely weigh the considerations on one side or the other. Even ignorance of rights, if equal on both sides, may not avail to impeach the transaction." But if the exchange of interest does not appear at all fair, or the ignorance of rights be one-sided, even the favour accorded by Courts of equity to family settlements will not avail to support them. *Baker* v. *Bradley.*

In *Fane* v. *Fane* (*e*) a son, tenant in tail in remainder, joined with his father, the tenant for life, in resettling the family estates. The son was mainly induced to do so by an innocent misrepresentation of his father that a charge of £5000 upon the estates was not (as was the fact) a subsisting charge, but that the father had the power to create it. The release of this supposed power to charge by the father was the chief consideration for the execution of the deed by the son. It was held by Hall, V. C., that the * son was [* 266] entitled to be released from the resettlement by reason of the mistake, notwithstanding the general rule in favour of family settlements. The father by the resettlement obtained very substantial benefits; and gave up his right to charge portions, which was not, under the circumstances, a very substantial thing. In the resettlement there was no provision for the son at all, and some of the limitations in the original settlement were struck out. By the resettlement an ultimate power of appointment was reserved to the survivor of the father and son, which was a very substantial benefit, for it was a power exercisable at once. *Fane* v. *Fane.*

It is a well-settled principle that in questions on the statutes of Elizabeth considerations not mentioned in a deed may be resorted to, both at law (*f*) and in equity (*g*), to support it, provided they be not inconsistent with what appears on the face of the deed (*h*). Considerations not mentioned in a deed may support it if not inconsistent with it.

(*d*) 7 De G. M. & G. 620.
(*e*) L. R. 20 Eq. 698.
(*f*) *Gale* v. *Williamson*, 8 M. & W. 405, 409–411.
(*g*) *Barnardiston* v. *Simpson*, post, Appendix No. VII; *Ford* v. *Stuart*, 15 Beav. 493; *Pott* v. *Todhunter*, 2 Coll. 76, 84; *Scott* v. *Scott*, 18 Jur. 755.
(*h*) Lord Punket, in *Nixon* v. *Hamilton*, 2 Dr. & Wal. 385; see

Parol evidence of such consideration dehors the deed may be adduced to establish it (*i*); but to support a deed voluntary on the face of it against creditors or purchasers the proof of valuable consideration must be clear and free from suspicion (*k*).

Nominal consideration.

The expression of a nominal consideration, and no general words, is not inconsistent with the fact that money or money's worth was the real consideration (*l*); but it is usual in post-nuptial settlements and deeds of gift generally to insert the words "and for divers good considerations" (*m*). This is not only for the purpose of letting in the averment of considerations not appearing * in the deed (*n*), and deterring pur- [* 267] chasers and mortgagees from dealing with the property on the assumption of the settlement being voluntary; but also because, although such words do not amount to any evidence of a valuable consideration, nor do they, without more, raise a primâ facie case in favour of the deed, yet where a primâ facie case *is* raised on the deed the onus of proving that there was no valuable consideration would be on those disputing the deed (*o*). Where a settlement after marriage was expressed to be in consideration of "5*s.* and divers other good and valuable considerations," and no evidence of value was adduced by those supporting, or of want of value by those impeaching, the deed, an inquiry was directed whether the deed was founded on any and what valuable consideration (*p*).

"Divers good considerations."

Chapman v. *Emery*, 1 Cowp. 278; *Ferrars* v. *Cherry*, 2 Vern. 384; *Senhouse* v. *Earle*, Amb. 285; *Colman* v. *Sarrel*, 1 Ves. Jun. 50, 51; *Leifchilds's* v. *Case*, L. R. 1 Eq. 231; *Doe* v. *Sherlock*, Fox & Sm. (Ir. Rep.) 90; *Langley* v. *Brown*, 2 Atk. 195, 202, 2 Phil. Evid. 8th ed. 761; notwithstanding *Peacock* v. *Monk*, 1 Ves. 128; *Clarkson* v. *Hanway*, 2 P. W. 204; and *Watt* v. *Grove*, 2 Sch. & Lef. 501.

(*i*) *Rex* v. *Inhabitants of Scammonden*, 3 T. R. 474; *Rex* v. *Inhabitants of Laindon*, 8 T. R. 379, 382; *Filmer* v. *Gott*, 4 Bro. P. C. by Toml. 230, Tayl. Evid. 8th ed. 969; *Harman* v. *Richards*, 10 Hare, 81; *Bayspoole* v. *Collins*, L. R. 6 Ch. 228; *Mullins* v. *Guilfoyle*, L. R. 2 Ir. Ch. 95.

(*k*) *Graham* v. *O'Keefe*, 16 Ir. Ch. Rep. 1, 14; *Levy* v. *Creighton*, 22 W. R. 605; ante, p. 219.

(*l*) *Leifchild's Case*, L. R. 1 Eq. 231; *Coultwas* v. *Swan*, 19 W. R. 485.

(*m*) Dav. Prec. 4th ed. vol. 1. 64.

(*n*) *Rex* v. *Inhabitants of Scammonden*, 3 T. R. 474; *Rex* v. *Inhabitants of Laindon*, 8 T. R. 379–382; *Bishop of Exeter* v. *Gully*, 5 Man. & R. 457, 491–2.

(*o*) Per Lord Hatherley (then Sir W. P. Wood, V.C.) in *Kelson* v. *Kelson*, 10 Hare, 385, 388; ante, p. 84.

(*p*) *Gully* v. *Bishop of Exeter*, 2 Moo. & P. 266, 5 Bing. 42; and see *Kelson* v. *Kelson*, 10 Hare, 385, 388.

Natural love, &c., not inconsistent with valuable consideration.

Although a conveyance for fictitious consideration may not afterwards be set up as a gift (*q*), a grant to a relation, though expressed to be made in consideration of natural love and affection, may be averred and shewn to have been made in consideration of the marriage of the grantee (*r*), or other valuable consideration (*s*) as payment of debts (*t*), such consideration not being inconsistent with that alleged. It is not in contradiction of the expressed consideration to prove a larger consideration than that mentioned (*u*); though such words as "and for divers other good causes," &c., were not used (*v*). It may be shewn that the consideration stated to have been paid in money was paid, not in money, but in goods (*w*).

Proof of larger consideration.

Bond supported by deed not referring to it.

A bond given to his father by a son, binding him in a penal sum of £500 to support his father's wife during her life, and his other children until they respectively arrived at the age of * eighteen, has [* 268] been held a sufficient consideration to support against creditors an assignment by the father to him of his dwelling-house, business, stock-in trade, and household furniture, by a deed in which there was no reference to the bond, and which was expressed to be in consideration of natural love and affection only (*x*).

Consideration to be decided *at time* settlement is executed.

The question whether the consideration is valuable, or not, is to be decided by the circumstances at the time the deed which is impeached was executed (*y*); and not by the light of subsequent events. If, then, the consideration be something future or contingent, and, after the execution of the deed, it fails, the deed is not thereby avoided (*z*).

Paget v. *Paget*.

It has been held in Ireland, in *Paget* v. *Paget*, (*a*),

(*q*) *Bridgman* v. *Green*, 2 Ves. 627–8, 2 Com. Dig. 640; *Filmer* v. *Gott*, 4 Bro. P. C. 230; *Hughes* v. *Scanor*, 18 W. R. 108, 1122.
(*r*) *Tanner* v. *Byne*, 1 Sim. 166.
(*s*) *Doe* v. *Sherlock*, Fox & Sm. (Ir.) 79, 90; *Harman* v. *Richards*, 10 Hare, 81; contrà, *Ball* v. *Burnford*, Prec. Ch. 113; *Coultwas* v. *Swan*, 19 W. R. 485.
(*t*) *Attwell* v. *Harris*, 2 Ro. Rep. 91, 2 Ro. Ab. 790.
(*u*) *Clifford* v. *Tarrell*, 1 Y. & C. Ch. 138, S. C. 9 Jur. 633.
(*v*) *Barnardiston* v. *Simpson*, post, Appendix No. VII.
(*w*) *Smith* v. *Battams*, 26 L.J. Ex. 232.
(*x*) *Gale* v. *Williamson*, 8 M. & W. 405.
(*y*) *Hitchcock* v. *Giddings*, 4 Prec. 135; *Hanks* v. *Pulling*, 6 E. & B. 659; *Nairn* v. *Prowse*, 6 Ves. at p. 758; *Mortimer* v. *Capper*, 1 Bro. C. C. 156, Fry, Sp. Pf. 2nd ed. 196; *Mackie* v. *Herberson*, 9 App. Cas. 337, 341, 343.
(*z*) Co. Litt. 204 a.
(*a*) 9 L. R. Ir. 128.

A deed, then for value, cannot afterwards become voluntary.

decided under 10 Car. 1, sess. 2, c. 3 (analogous to 27 Eliz. c. 4), that the failure by matter ex post facto of what was at the date of a conveyance of land an adequate valuable consideration will not operate retrospectively, so as to render such conveyance liable to be defeated, under it, by a subsequent conveyance for value of the same land. It was said in that case by the Vice-Chancellor: "I apprehend that the imputed fraud under the statute must be presumed to have existed, if at all, at the time at which the conveyance sought to be defeated was executed. It seems to me that the failure by matter ex post facto of what was at the time a sufficient consideration, cannot operate so as to create the supposed fraud retrospectively." A deed, however, which at the date of its execution is voluntary, may become valid by force of subsequent events (*b*).

Court looks at all the circumstances.

In considering whether or not a deed is voluntary, the Court will take into consideration all the circumstances under which it was executed and the relative positions of the parties, and will look at other deeds executed at the same time, if they appear to be part of the same transaction, although not mentioned in the impeached deed (*c*); and will take into consideration [* 269] any evidence * which tends to throw light on the reasons and considerations for the settlement. Although there may be no proof, either by extrinsic evidence or by anything appearing on the face of the deeds, of any stipulations or agreement which there was sufficient consideration to support, yet several transactions may be viewed together, and the parties to them must be considered to have stipulated according to the rights which they had; and any consideration which is found to exist will either support the whole transaction or none at all (*d*).

Harman v. *Richards*. Three distinct deeds treated as forming one transaction and supporting each other.

In *Harman* v. *Richards* (*d*), under the will of her father, H. R. was entitled to the income during her life to her separate use, without power of anticipation, of a portion of his residuary estate, remainder to her children; J. R., junior, was the only child. In 1842, Higgs,

(*b*) *Clarke* v. *Willott*, L. R. 7 Ex. 317; post, pp. 314 et seq.

(*c*) *Thompson* v. *Webster*, 4 Drew, 632, S. C. 4 De G. & J. 600; *Ford* v. *Stuart*, 15 Beav. 493; *Harman* v. *Richards*, 10 Hare, 81; *Cornish* v. *Clark*, L. R. 14 Eq. 184; *In re Johnson*, 20 Ch. D. 389, S. C. 51 L. J. (N.S.) Ch. 503, et infra.

(*d*) *Harman* v. *Richards*, 10 Hare, 81, 88; *Cornish* v. *Clark*, L. R. 14 Eq. 184.

the surviving trustee of the will, sold out part of the fund, and lent it, with other moneys of his own, to J. R., junior, on the security of the joint and several promissory note of J. R., the father, H. R., and J. R., the son, and also on the security of the deposit of title deeds of property belonging to J. R., the father. In 1846 the three deeds were executed (each bearing date the 20th of January), which were taken to have formed one transaction. By the first, H. R., the mother, released and assigned to Higgs, the trustee, her life estate under her father's will, in consideration of which Higgs covenanted to pay her an annuity of £250 for her life. By the second deed, J. R., the son, assigned his reversionary interest under the same will in consideration of the release by Higgs of the money due to him, and of Higgs giving up the title deeds deposited as security. The third deed (which was the one impeached by the bill) was in form a voluntary conveyance, whereby J. R., the father, conveyed the property comprised in the deeds previously deposited, and a sum of money owing to him on mortgage, to trustees in trust for H. R. (his wife) for life, remainder to himself for life, remainder to the wife of J. R., the son, for life, remainder to her children by J. R. The bill was filed by creditors under a joint and several covenant (in a mortgage deed), entered into by J. R., the father, and J. R., the son.

Sir G. J. Turner, V.C., said the deed, taken alone, was voluntary, *but that to decide the question it [*270] must be considered whether that deed was to be taken by itself, or in connection with the purchases from the son and the mother; that the question whether several deeds are to be taken as part of the same transaction must depend upon all the surrounding circumstances of each particular case, and not upon the simple fact whether the deeds are or are not by express reference grafted into or connected with each other; and his Honour, on the facts of the case, came to the conclusion that the settlement and purchases were connected together, and were, in fact, parts of the same transaction. Several circumstances, he said, lead to this conclusion—the delivery up of the deposited deeds, and the conveyance (of the legal estate in another property) from the son to the father, tending to shew that the property was about to be dealt with, and the corresponding variations in the money to be paid for the life interest, and in the property to be settled—directly evidenced the con-

nection of the transactions ; and his Honour thought there was sufficient consideration for the settlement, as it could not have been made without the concurrence of H. R., the mother ; so that although, her life estate being fettered by a restriction on alienation, she could not pass or affect her future interest, yet she was competent to, and did, release her trustee in respect of all claims for past income, The wife must be taken to have agreed with her husband that, if he would make the settlement, she would not interpose to prevent the title deeds (by which her interest was secured) from being delivered up. For, although there was no evidence of any such agreement, the parties must be considered to have stipulated according to the rights which they had.

Family settlements upheld if *any* value.

A settlement will sometimes be upheld, even against creditors or purchasers, as a family arrangement; but to do so will require (as in other cases) that there shall be no doubt as to the honesty of the arrangement (*e*), and also that there shall be *some* valuable consideration (*f*).

[* 271] *This is it which constitutes the difference between deeds or arrangements which a Court will uphold or enforce as valid and binding only between the parties (*g*), and those which are valid against the whole world.

Cornish v. *Clark.*

In *Cornish* v. *Clark* (*h*) a debtor gave each of his three sons a threshing-machine, and they, by agreements of even date, each agreed to pay him, in consideration of that gift, an annuity of £20. On November 7 following he gave a sum of £300 to his six daughters, and, by a deed dated November 12, he assigned a debt of £300 secured by mortgage to trustees on trust to divide the same among his six daughters and the children of a deceased daughter. These dispositions comprised his entire property. On an action by a creditor under 13 Eliz. c. 5, it was held that the whole was void against creditors but only against them. The various gifts formed part of one whole connected plan, and that was a scheme, probably at the instance of the donees, to divide the property of the debtor equitably among themselves, but without regard to the claims of creditors.

(*e*) *Greenwood* v. *Greenwood*, 2 D. J. & S. 28 ; *Penhall* v. *Elwin*, 1 Sm. & Giff. 269 ; *Tennent* v. *Tennents*, L. R. 2 H. L. Sc. 6 ; *Miller* v. *Harrison*, 5 Ir. Eq. 324.

(*f*) See *Townend* v. *Toker*, L. R. 1 Ch. 446 ; post, pp. 272, 275, 276.

(*g*) *Smith* v. *Mogford*, 21 W. R. 472.

(*h*) L. R. 14 Eq. 184.

In *In re Johnson* (*i*) J., in consideration of love and affection and of a covenant by her two daughters, granted a farm and premises in trust for them in equal shares. They covenanted to pay all just debts incurred by her up to the date of the deed of grant in connection with the working and management of the farm. This deed was a conveyance of all J.'s property. An action was brought by a creditor to set aside this deed under 13 Eliz. c. 5. His debt was not incurred by J., but by her predecessor on the farm, with whom she had entered into a like covenant; but she had given a promissory note for the amount of the debt. One daughter was an infant at the date of the deed; the other daughter had carried on the farm since that date. Fry, J., in the course of his judgment, pointed out that the consideration was in part meritorious and in part valuable. His Lordship then reviewed the circumstances of the family at the time of the execution of the deed, and held that, independently of the result of the deed, they led him to the conclusion *that the intention of the [* 272] parties was to make a perfectly honest family arrangement, under which the daughters were to undertake the burden of paying their mother's debts, and, in consideration of that, were to take immediately that farm which in all probability they would otherwise have received by will upon their mother's death. His Lordship then pointed out the favour shewn by the Courts as to the question of consideration in family settlements. "It appears plain, that though valuable and good consideration was given by the daughters, that consideration cannot have been the full value of the estate. But it also appears to me to be plain that when a bonâ fide and honest instrument is executed for which valuable consideration is given, and the instrument is one between relatives, the Court cannot say that the difference between the real value of the estate and the consideration given is a badge of fraud; and if it is not a badge of fraud, or evidence of an intention to defeat creditors, it has no relation to the case" (*k*). *In re Johnson.*

In general a consideration sufficient to induce the Court to decree specific performance of a contract must be such a consideration as would prevent a deed founded on it from being void under the statutes of Elizabeth as voluntary (*l*). Consideration sufficient for specific performance usually adequate to uphold deed under these statutes.

(*i*) 20 Ch. D. 389, S. C. 51 L. J. (N.S.) Ch. 503.
(*k*) And see *Ex parte Eyre*, 44 L. T. (N.S.) 922.
(*l*) See post, pt. v. ch. i.

This is not *always* a safe guide, however, in the question of value or not as against creditors or purchasers (*m*), for deeds which might, if still only resting in fieri, have been enforced against some of the parties to them as a fair family arrangement (*n*), may sometimes be void against creditors. "Courts of equity," said Sir John Stuart, V.C., in a case in which he decreed a settlement void against creditors (*o*), "have gone very far, and on a very useful and rational principle, to maintain family settlements. A deed made between the members of a [* 273] family, founded *on no better consideration than the compromise of a doubtful right (*p*), may be upheld on this principle. And in this case, if there had been no circumstances of suspicion—no contravention of higher rights—the claim of a parent who had made large pecuniary advances in favour of a child, advances which had, perhaps, at first formed the obligation of a debt, this Court might even after lapse of time had terminated all obligation as a debt have considered the assertion or the existence of such a claim, however doubtful, as a sufficient consideration to support a deed purporting, in the way of family arrangement, to make a provision founded on such a consideration. But where the rights of existing creditors are directly interfered with by such an arrangement, and property to which those creditors might resort is removed from their reach, a more severe rule must be applied. And if there are such circumstances of suspicion as occur here from the embarrassed circumstances of the grantor, the pressure of creditors, and the appearance of a voluntary arrangement originating in the necessity and fear induced by this pressure, the case is carried beyond the principle which sanctions and supports a deed as a mere family arrangement, and not on actual valuable consideration."

Compromise.

Stockley v. *Stockley.*

So also in *Stockley* v. *Stockley* (*q*), Lord Eldon said:

(*m*) It seems to have been the law at one time that natural affection was sufficient consideration to induce the Court to enforce specific performance: *Wiseman* v. *Roper*, 1 Rep. Ch. 84 [158]; *Ellis* v. *Nimmo*. Ll. & G. (t. S.) 333; but see now *Jefferys* v. *Jefferys*. Cr. & Ph. 138; *Dillon* v. *Coppin*, 4 My. & Cr. 647–671.

(*n*) *Smith* v. *Mogford*, 21 W. R. 472.

(*o*) *Penhall* v. *Elwin*, 1 Sm. & G. 258, 269.

(*p*) It will be observed, however, that in this case there was not even any doubtful right: see *Smith* v. *Mogford*, 21 W. R.472; *Miller* v. *Harrison*, 5 Ir. Eq. 324; *Mason* v. *Mason*, Times Rep. (1886) 266.

(*q*) 1 V. & B. 30.

"In family arrangements the Court has administered an equity which is not applied to agreements generally. One very strong instance is the case of *Pullen* v. *Ready* (*r*), where legacies were given, to be forfeited by marriage without consent; a family arrangement took place giving that legatee the benefit of the legacy. That arrangement, it was suggested, was under a mistake of law—that the condition was only in terrorem (which, under the circumstances, it was not), and it was contended the parties were not bound; but Lord Hardwicke said, 'There was the will before them, and if they chose to construe it, taking upon themselves the knowledge of the law, he would hold them bound.' That case, with the passage in *Cory* v. *Cory* (*s*), which is certainly *very strong, that an agreement, to set- [* 274] tle disputes in a family, and a reasonable agreement should be enforced against a party who was drunk at the time, and *Stapilton* v. *Stapilton* (*t*), which, with all the able reasoning in it, is an extremely strong case, lead me to the opinion that in these family arrangements the Court does not quite go the length of denying relief upon the principle that prevails between strangers" (*u*).

Stapilton v. *Stapilton.*

This follows what Lord Hardwicke said in the leading case of *Stapilton* v. *Stapilton* (*v*), that, considering what would have been the consequence of letting the agreement in that case fall to the ground, "*a Court of equity will be glad to lay hold of any just ground to carry it into execution and to establish the peace of a family*" (*w*); but this reasoning, though very just and rational when applied for the purpose of preventing any of the parties to such an agreement from disturbing or refusing to execute, would become neither just nor reasonable against the bonâ fide claims of creditors or purchasers (*x*).

The converse position, of the same kind of contract

(*r*) 2 Atk. 587.

(*s*) 1 Ves. 19. This does not appear quite a correct statement of the case, for the question was, whether it was sufficient to *set aside* an agreement that one of the parties was drunk. See *Cann* v. *Cann*, 1 P. Wms. 727.

(*t*) 1 Atk. 2; Wh. & Tu. L. C. 6th ed. vol. 2, 920 et seq.

(*u*) See also Lord St. Leonards' judgment in *Westby* v. *Westby*, 2 D. & War. 502, 525.

(*v*) 1 Atk. 11.

(*w*) See *Stephens* v. *Trueman*, 1 Ves. 74; *Wycherley* v. *Wycherley*, 2 Eden, 177–8.

(*x*) *Matheus* v. *Feaver*, 1 Cox, 280.

Void against creditors,

being void when opposed to creditors, is illustrated by a case (*y*) decided twenty years after, in which G. P., having two sons, John and Giles, by his will gave a leasehold estate to Giles, the younger son (charged with legacies and an annuity), and devised all the rest, residue, and remainder of his real and personal estates, goods, and chattels to trustees in trust for the same son till he attained twenty-one, and then the trust to cease. Giles attained twenty-one in the lifetime of the father, the testator, soon after whose death the eldest son claimed the freehold estate as heir-at-law to his father, and insisted that the will was void, and threatened to commence a suit at law unless Giles would convey the estate to him; to avoid this, at the recommendation of his mother, Giles released and conveyed his right to [* 275] his brother *John, who covenanted *to pay half the annuity* charged on Giles's leasehold estate. At the time of executing the release Giles was indebted by bond, and nine years after became bankrupt. Lord Keeper Henley decided that the younger brother was entitled under the will to the fee simple of the freehold estate; and that, although there was no fraud, the release was void as against the creditors of Giles, "being a voluntary conveyance."

though enforceable between the parties.

This deed was founded on a mistake of law common to all the parties to it, and was therefore such a contract as, according to the authorities (*z*), the Court would have enforced between the parties.

Agreement may only bind family.

The same sort of distinction was drawn by Lord Hardwicke as to cases in which limitations to collaterals in articles of agreement or marriage will be enforced—that an agreement sufficient to bind the several branches of a family is not necessarily adequate to bind creditors (*a*). In *Ford* v. *Stuart* (*b*), indeed, Lord Romilly, M.R., said that the Court of Chancery will not compel a person to make a settlement if he could on the next day have defeated it by selling the property to a purchaser for valuable consideration; but this argument would apply equally to the interference of the Court in upholding voluntary settlements actually completed,

(*y*) *Peat* v. *Powell*, 1 Amb. 387.

(*z*) *Pullen* v. *Ready*, 2 Atk. 587; *Clifton* v. *Cockburn*, 3 My. & K. 76; *Naylor* v. *Winch*, 1 Sim. & S. 564; *Great Western Railway Co.* v. *Cripps*, 5 Hare, 91; *Rogers* v. *Ingham*, 3 Ch. D. 351.

(*a*) In *Goring* v. *Nash*, 3 Atk. 188, and cases there cited in note (Sanders' ed.).

(*b*) 15 Beav. 504.

which are no less liable to be defeated by a subsequent sale for value.

This distinction introduces an element of some difficulty as to the statutes of Elizabeth with regard to family arrangements; it shews that cases in which there was no question on those statutes cannot always be relied on as laying down rules as to the consideration which will be good against creditors or purchasers.

It will, therefore, be necessary to consider those decisions only in which their rights were actually opposed by a transaction in the nature of a family arrangement. Those cases in which mere *generosity, the [* 276] intention of carrying out the provisions of an invalid will, or the laudable intention of deciding family disputes or saving the family honour, have been held sufficient consideration to induce the Court to decree specific performance, or to uphold the settlement between the parties to it, are not cases which prove that the settlement, even although strengthened by time and acquiescence, would have been allowed to defeat existing creditors or subsequent purchasers (*c*).

Ordinary rules inapplicable to family arrangements.

But, although the same rules are not applied where the settlement is disputed by creditors or purchasers as between the parties themselves, it will be found that, even as against creditors or purchasers, family arrangements are exempt from the ordinary rules which affect other deeds, the consideration being composed partly of natural love and affection and partly of value. The consideration will not be nicely balanced; for by what scale of money consideration are these objects to be estimated? (*d*)

Obligation. Compromise.

There must be either some legal obligation in discharge of which the settlement was made (*e*); or a fair compromise of rights really doubtful (*f*); though the

(*c*) *Stapilton* v. *Stapilton*, 1 Atk. 2, and S. C. 2 Wh. & Tu. L. C. 6th ed. vol. 2, 920; and Lord Henley's judgment in *Wycherley* v. *Wycherley*, 2 Eden, 177; *Smith* v. *Mogford*, 21 W. R. 472; ante, pp. 246, 247, 270, post, p. 280.

(*d*) *Persse* v. *Persse*, 7 Cl. & F. 279, 318; *Baker* v. *Bradley*, 7 De G. M. & G. 620; *Mullins* v. *Guilfoyle*, L. R. 2 Ir. 109; *In re Johnson*, 20 Ch. D. 397. S. C. 51 L. J. (N.S.) Ch. 503; ante, pp. 270 et seq.

(*e*) Ante, pp. 244, 249.

(*f*) *Neale* v. *Neale*, 1 Keen, 672; see *Gordon* v. *Gordon*, 3 Sw. 400–463; *Stockley* v. *Stockley*, 1 V. & B. 23–30; *Damage* v. *White*,

Exchange. Property got by the settlement.

claim ultimately appears to be wholly unfounded (*g*); or a bonâ fide interchange of interests (*h*); or it must be shewn that settling the property was the only way in which that property could have been obtained at all (*i*).

Williams v. *Williams.* Exchange of interests.

The case of *Williams* v. *Williams* (*k*), though not a case of creditors or purchasers, shews that any bonâ [* 277] fide interchange of *rights will be sufficient to uphold a family settlement as being on valuable consideration. In that case A. died in 1831, possessed of real estates, of socage, gavelkind, and borough English tenure, and also leaseholds, stock-in-trade, and other personal property, and leaving a wife and two sons. He left an invalid will, dividing all his property equally between his two sons, subject to certain provisions for his widow for her life. At an interview between the brothers shortly after probate of the will had been refused, the elder brother declared that the invalidity of the will should make no difference, and that the property should be "not mine or thine, but ours." No written agreement was made, but for twenty years after the death of A. the two brothers carried on the partnership together, and dealt with the whole property, real and personal, as if it belonged to them equally, and the widow never insisted on her rights in her husband's property (*l*). In 1851 the partnership was dissolved, and the younger brother having died, his representative filed a bill for the equal division of the property. The Vice-Chancellor held (*m*) that a family arrangement which the Court could uphold had been proved. On appeal, Lord Chelmsford said, that there being here no doubtful right to be compromised, no dispute between the brothers which was to be set at rest, no honour of the family involved, it differed from those cases of family arrangement formerly the subject of decision, and that the elder brother could not be bound by the arrangement unless some consideration could be shewn,

1 Sw. 137, 151; *Lucy's Case*, 4 De G. M. & G. 356; *Cook* v. *Wright*, 1 B. & S. 559; *Miller* v. *Harrison*, 5 Ir. Eq. 324; *Mason* v. *Mason*, Times Rep. (1866) 266.

(*g*) *Callisher* v. *Bischoffsheim*, L. R. 5 Q. B. 449; *Ockford* v. *Barelli*, 20 W. R. 116; but see *Ex parte Banner*, 17 Ch. D. 480.

(*h*) *Williams* v. *Williams*, L. R. 2 Ch. 294, et infra; *Persse* v. *Persse*, 7 Cl. & F. 279; *Hewison* v. *Negus*, 16 Beav. 594, post, p. 288; *Bennett* v. *Bernard*, 10 Ir. Eq. Rep. 584; *Lovell* v. *Wallis*, (No. 2), 50 L. T. (N.S.) 681; ante, p. 264.

(*i*) *Pott* v. *Todhunter*, 2 Coll. 76.

(*k*) L. R. 2 Ch. 294.

(*l*) *Roe* v. *Mitton*, 2 Wils. 356.

(*m*) 2 Dr. & Sm. 378.

but that there was quite sufficient consideration to prevent its being a mere voluntary agreement, and the Court will not be disposed to scan with much nicety the amount of the consideration. The borough English property, which belonged to the younger brother, was of some, though of trifling, value, and was brought by him into the common stock, and in a case of this kind some consideration might perhaps be found in his leaving his share of the stock-in-trade in the business, and continuing to carry it on, instead of breaking up the concern. But there could be no doubt the widow was a party to the whole arrangement, and the consideration moving from her must be taken into account; on the understanding that there would be but one purse between the two sons, and that they would continue *the business and maintain her out of it, she al- [*278] lowed her interests in the real and personal estate to be considered as part of the joint property, which her sons were together using and enjoying. If a valuable consideration was required to make the family arrangement binding, it was sufficiently provided by the widow agreeing to become a party to it, and relinquishing her rights for the purpose of carrying it out.

Pott v. *Todhunter* (*n*) is an instance of a case where settling the property was the only way in which that property could have been obtained at all. There S., a person who was in loco parentis to A. G. H., a married woman, devised to her a rent charge for her life, and also bequeathed certain personal property to her for her separate use. The will being clearly inoperative as to the rent-charge, and it being very doubtful whether it was valid as to the personality, the heir and next of kin made a partial sacrifice of their interests in order to carry the testator's intentions into effect, and with that view allowed the husband of A. G. H. to take out administration to the deceased; and the legacy which S. had attempted to bequeath was paid to the husband as administrator, and of that sum he retained a small part for his own use, and settled the remainder on his wife and children. At the time when this settlement was executed the husband was in insolvent circumstances. But although the deed was on the face of it voluntary, it was upheld against the creditors of the husband, because the whole matter was arranged by a friend of the family, who took an immense deal of

Pott v. *Todhunter.*

Property settled only obtained on that condition.

(*n*) 2 Coll. 76.

trouble, and by tact and good management, and obtaining the co operation of the persons interested in the estate, effected the arrangement of which the settlement was the result; and did all this, not for the benefit of the husband, but in order to make a provision for the wife and children, and on the express terms that out of whatever he should be able to procure from the property he should have power to make such settlement on the lady and her family as he should think fit. "That such an agreement," said Vice-Chancellor Knight Bruce, "was for valuable consideration no man living can doubt."

Indeed, it is strange that such a settlement should [* 279] ever have * been called in question by the husband's creditors, for the money settled was never liable to their claims, the husband never having had it actually in his power. It was first invested in Consols, and then stood in the names of third parties until the settlement of it was executed, and may therefore be said to come under the old rule, in force when money was not liable to execution (*o*), that a man might on a purchase have the estate conveyed on any trusts he thought proper (*p*).

Persse v. *Persse.* Past value, part love and affection.

In *Persse* v. *Persse* (*q*) R. P., a man of advanced age, being heir presumptive of R. P. P. (then supposed to be a lunatic), and being under apprehension that unfair means might be resorted to in the then state of mind of R. P. P. to deprive the family of the succession to the estate in question, agrees with his eldest son, D. P., that D. P. should sue out a commission of lunacy against R. P. P., and carry on such other necessary suits and law proceedings at his own expense, but in the name of R. P. His father, by deed, in consideration of this agreement and of natural love and affection, covenanted to convey all the estates which would descend to him on the death of R. P. P. to the use of himself for life, remainder for the benefit of D. P. and his heirs male by his then wife.

The commission was accordingly issued, R. P. P. was declared lunatic, and out of his estate D. P. was reimbursed for his expenses. R. P. was then sixty three years of age, the lunatic was forty, and D. P. younger.

(*o*) Before 1 & 2 Vict. c. 110.
(*p*) *Fletcher* v. *Sedley*, 2 Vern. 490; disapproved by Lord Hardwicke, 1 Ves. 130; ante, p. 20.
(*q*) 7 Cl. & F. 279, 317.

On the death of the lunatic, R. P., the father, entered into possession of the estate, and conveyed it to his second son, R. H. P., for valuable consideration. Lord Cottenham and the House of Lords held that as far as consideration was concerned there was sufficient to support the deed. There was some consideration proceeding from the son. His prosecuting the suit and the father's inability to do so, from whatever cause proceeding, shew that the covenant was not merely voluntary, and the situation of the parties and the properties in question afford a complete answer to the objection that the consideration was inadequate.

The son was in possession of the family estate, but as tenant for life only; from the relative ages of the father and of the son *and of the supposed lunatic, [* 280] the probability was much in favour of the son, by the death of his father before the lunatic, succeeding as heir to whatever estate might descend from him; but there was a strong apprehension, and, as the event proved, a great probability, that without active measures to counteract the fraudulent projects of others no part of the lunatic's estate would descend to either of them.

The father also was anxious to secure the re-union of the two estates, and to have them both settled in the same manner. The consideration in this and in other such cases is compounded partly of value and partly of love and affection, and is of such a nature that the adequacy of it cannot be estimated; and in this case the consideration was partly the services of the son in securing that which would otherwise probably have been lost, and partly the fairness of the arrangement, having regard to the manner in which at the time of the settlement it was likely that the estate would descend.

Natural love and affection formed a small part only of the consideration, and therefore it was valid against the subsequent purchaser (*r*).

No question of consideration till grantee is cognizant of deed.

It must be borne in mind, in regard to a voluntary deed, that, unless and until that deed is communicated to the party to be benefited by it, there can be no question of consideration. For there can be no considera-

(*r*) *Cornish* v. *Clark*, L. R. 14 Eq. 184; *In re Johnson*, 20 Ch. D. 389, S. C. 51 L. J. (N.S.) Ch. 503, ante, pp. 246, 247, 270 et seq.; where fraud, aliter: *Filmer* v. *Gott*, 4 Bro. P. C. 230.

tion unless either there is a contract in the first instance, or, failing that, such notice on the part of the person benefited by that deed after knowledge of it as changes his position. If, after the voluntary deed has been executed, its contents are made known to the person who takes the benefit of it, and acting upon the faith of it he substantially alters his position, and by so doing gives value to the donor, being the value the donor expected him to give, he has in fact accepted the voluntary deed as a consideration for the action he has taken on the faith of it. But so long as he has no knowledge of that deed it is impossible he can give value in that way (*s*).

(*s*) *In re Barker's Estate*, 44 L. J. (N.S.) Ch., per Jessel, M.R., 487; *Cracknall* v. *Janson*, 11 Ch. D. 1; post, pp. 322 et seq.

CONSIDERATION BETWEEN HUSBAND AND WIFE.

Husband and wife's power to contract together.

THE unity which at law was formerly presumed to exist in the case of husband and wife did not prevent a valuable consideration passing between them in equity, independently of any contracts entered into before marriage, or on separation (*t*). As to property settled simply to the separate use of a married woman, she could enter into contracts, and do any other acts with respect to it, either in relation to her husband or strangers, as if she were a feme sole (*u*); and further in reference to any matter as to which she was placed in the position of a feme sole she was in a position to contract with her husband (*v*).

Effect of Married Women's Property Act, 1882.

It seems doubtful whether the common law doctrine of the unity of husband and wife (*w*) has been any further infringed upon by the Married Women's Property Act, 1882, than by excluding from its scope the cases to which the provisions of that Act apply (*x*).

The Act was not intended, said Cotton, L.J., to alter any rights excepting those of the husband and wife *inter se* (*y*). It would therefore appear that the common law doctrine still applies in cases between the husband and wife and a third person.

The capacity of a married woman to contract in respect, and to the extent, of her separate property, and to

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(*t*) *Cracherode* v. *Hallam*, post, Appendix No. IX., 1 Bl. Com. 442; *Clerk* v. *Nettleship*, 2 Lev. 148; *Hewison* v. *Negus*, 16 Beav. 598; *Arundell* v. *Phipps*, 10 Ves. 146.

(*u*) *Blake* v. *French*, 5 Ir. Ch. 246, 257; *Woodward* v. *Woodward*, 3 D. J. & S. 672; 2 Rop. Husb. & W. 182; 2 Bright, Husb. & W. 220; Griffith, 5th ed. 20.

(*v*) *Vansittart* v. *Vansittart*, 4 K. & J. 62, S. C. 2 D. & J. 249; *Nicholl* v. *Jones*, L. R. 3 Eq. 709; infra, p. 301.

(*w*) *Dias* v. *De Livera*, 5 App. Cas. 123.

(*x*) *In re March*, 24 Ch. D. 222, S. C. 27 Ch. D. 166; *Symonds* v. *Hallett*, 24 Ch. D. 346; *Butler* v. *Butler*, 14 Q. B. D. 831, S. C. 16 Q. B. D. 374.

(*y*) *In re March*, 27 Ch. D., per Cotton, L.J., 170.

[*282] sue and be sued, is by *this Act made the same as that of a feme sole (*z*). It is conceived that the liabilities by this Act imposed upon her do not affect her personally, but merely give remedies against her separate property (*a*).

When restraint on anticipation is annexed to separate use.

But where the separate property belonged to a married woman, without power of anticipation, she had no power of disposing of it or dealing with it in any way, and therefore she could not make any valid contracts with respect to it; nor did the possession of it enable her to make a covenant which could be enforced against her, whether entered into with her husband or other persons (*b*).

With regard to property to which a restraint on anticipation is annexed, the Married Women's Property Act, 1882, has not enlarged a married woman's powers. Her inability to bind such property, by contract or covenant, has not been altered, it is conceived, by this Act (*c*).

Under this Act a married woman may now enter into, and render herself liable in respect of, and to the extent of, her separate property on, any contract in all respects as if she were a feme sole (*d*).

Such contract or covenant may now be entered into by her with her husband with respect to her separate property as if she were a feme sole (*e*).

Married woman cannot contract if she has *then* no separate property.

It has been decided by Pearson, J., in *In re Shakespear* (*f*), that under the Married Women's Property Act, 1882, a married women can only enter into a binding contract at a time when she has existing separate property. She cannot enter into a contract which will bind any possible future separate property, if at that time she has no existing separate property; though of course her contract will bind after-acquired as well as

(*z*) 45 & 46 Vict. c. 75, s. 1 (2); see Griffith, 5th ed. 16, 17.
(*a*) *Atwood* v. *Chichester*, 3 Q. B. D. 722; Griffith, 5th ed. 31, 39; 45 & 46 Vict. c. 75, s. 1 (5).
(*b*) *Walrond* v. *Walrond*, Johns. 18.
(*c*) 45 & 46 Vict. c. 75, ss. 1 (2), 19; *Chapman* v. *Biggs*, 11 Q. B. D. 27; *In re Glanvill*, 31 Ch. D. 532; but see *In re Andrews*, 30 Ch. D. 159.
(*d*) 45 & 46 Vict. c. 75, s. 1 (2).
(*e*) *Butler* v. *Butler*, 14 Q. B. D., per Wills, J., 834, 835, S. C. 16 Q. B. D. 274.
(*f*) 30 Ch. D. 169.

then existing separate property, if still in her possession when judgment is recovered against her. And of course she cannot bind by a contract *any separate [*283] property to which a restraint on anticipation is annexed (*g*).

But a married woman might before the Married Women's Property Act, 1882, and may now, validly contract with her husband or any other person as to property simply limited to her separate use (*h*), or any other property which she holds independently of her husband's rights, and which she has power to dispose of (*i*).

Giving up former settlement.

Thus it is clear that the wife's giving up an old settlement made in consideration of marriage (*k*), or a jointure (*l*), is sufficient to support, as for valuable consideration, a new settlement on her, although the second includes property of much greater value than the first (*k*).

Release of dower.

And it seems that, when a wife's right to dower out of her husband's lands was less easily barred than it now is, her relinquishing that right might constitute a valuable consideration between them (*m*). So where A.'s wife, who had a claim to an annuity charged on his lands by a voluntary deed, or a right to dower, concurred with her husband in a sale of some of his lands, and covenanted to levy a fine, and was induced to do so by other estates of her husband being settled on her and her issue, these articles were upheld as for sufficient consideration against a subsequent purchaser for value, although the wife, who covenanted to levy a fine, had died without doing so (*n*).

Dower Act.

But now the right to dower of women married since the 1st of January, 1838, has been placed completely

(*g*) See *Pike* v. *Fitzgibbon*, 17 Ch. D. 454 ; supra, p. 282.

(*h*) *Scot* v. *Bell*, 2 Lev. 70; *Greene* v. *O'Kearney*, 2 Ir. C. L. 267; *Hewison* v. *Negus*, 16 Beav. 594 ; and see 45 & 46 Vict. c. 75, s. 1 (2).

(*i*) See *Joyce* v. *Hutton*, 11 Ir. Ch. Rep. 123, reversed on appeal, 12 Ir. Ch. Rep. 71 ; and post, p. 293.

(*k*) *Scot* v. *Bell*, 2 Lev. 70.

(*l*) *Cottle* v. *Fripp*, 2 Vern. 220 ; and see post, pt. iv. Ch. v.

(*m*) *Jones* v. *Boulter*, 1 Cox, 288 ; *Lavender* v. *Blakstone*, 2 Lev. 146 ; *Hewison* v. *Negus*, 16 Beav. 594, 598 ; *Dawson* v. *Bank of Whitehaven*, 6 Ch. D. 218.

(*n*) *Fitzmaurice* v. *Sadlier*, 9 Ir. Eq. 595 ; followed by *Blake* v. *French*, 5 Ir. Ch. Rep. 246.

within the power of their husbands (*o*), it is apprehended that a release of dower could hardly be relied on as any consideration for a contract.

Property in which husband *and* wife have interests.

Where husband and wife both have interests in one [* 284] property, it *is quite open to them to enter into valid, and not voluntary, contracts with regard to that property (*p*).

Wife's realty.

Thus, where the wife has a freehold estate in fee, the title to which accrued to her before the 1st of January, 1883 (*q*), both she and her husband have certain interests in it; the husband receives the profits during her life, and at her death may be tenant by the curtesy, but without her concurrence he cannot deal with the property either by way of sale or lease.

Mortgage of separate estate.

Again, where a wife mortgages her separate estate, or property in which she has interests jointly with her husband, for her husband's benefit, in consideration of a settlement being made on her and her children, the settlement will be supported as on valuable consideration (*r*); for by such a settlement the husband's estate is exonerated, and he is not liable as a debtor to the wife's estate for the sum so raised by mortgage (*s*).

Wife's concurrence.

It has been argued that, on account of the mixed interests which the wife has with her husband in such property, her concurrence must *necessarily* give a valuable consideration to any settlement made of it, and that the consent of each to the alterations of their respective interests must be sufficient to support such an arrangement against creditors or purchasers. In *Parker* v. *Carter* (*t*) Sir J. Wigram gave it to be understood that such was his opinion, though he did not actually so decide; and Lord St. Leonards, when Lord Chancellor of Ireland, distinctly laid it down that a settlement by husband and wife of the wife's property

(*o*) 3 & 4 Will. 4 c. 105. Gavelkind lands are within the Act: *Farley* v. *Bonham*, 2 J. & Hem. 177.

(*p*) See *Cracherode* v. *Hallom*, post, Appendix No. IX.; *Teasdale* v. *Braithwaite*, 4 Ch. D. 85, S. C. 5 Ch. D. 630; *In re Foster and Lister*, 6 Ch. D. 87. See post, p. 290.

(*q*) 45 & 46 Vict. c. 75, ss. 5, 25; *Reid* v. *Reid*, 31 Ch. D. 402.

(*r*) *Carter* v. *Hind*, 22 L. T. 116; *Whitbread* v. *Smith*, 3 DeG. M. & G. 727, 739, 740; *Atkinson* v. *Smith*, 3 De G. & J. 186.

(*s*) *Lewis* v. *Nangle*, Amb. 150, S. C. stated 3 Sw. 212, n.; but see 45 & 46 Vict. c. 75, s. 3; Griffith, 5th ed. 51.

(*t*) 4 Hare, 409–10.

could not be voluntary (*u*). But this is opposed to what was said by Lord Romilly, M.R., in *Butterfield* v. *Heath* (*v*), that "the case in Blackstone (*w*) has settled the point, that a married woman is within the statute of 27 Eliz. In truth, if it had been decided otherwise, it would *have been to hold that, although a [* 285] married woman can, with the assistance of her husband, and by complying with the forms provided by the statute (*x*), make a good title to a purchaser for valuable consideration of the lands of which she is seised in fee simple, yet that she cannot make a voluntary conveyance of such lands." It has now been established that a settlement by a married woman of real estate of which she was owner in fee is for valuable consideration or voluntary, according as the circumstances of the case shew that a bargain between husband and wife was or was not made (*y*).

Settlement for value only if a *bargain*.

In an old case (*z*), where the wife joined with her husband in letting in an incumbrance on her jointure lands, and barring an estate tail, and the estate was settled on the husband for life, then on the wife for life, remainder to their sons in tail, remainder to their daughters in tail; a creditor by judgment, prior to the settlement, claimed as against the limitation to the daughters, and my Lord Keeper (*a*) was of opinion that this might have made a good consideration for both, but it was not expressed in the deed to be any consideration for settling the estate on the daughters, but was a voluntary gift of the wife to her husband, and therefore the daughters' estates must be taken to be voluntary.

Ball v. *Burnford*.

At the present day at least the mere fact of the real consideration not being expressly stated in the deed would not prevent it from being effectual (*b*), but in cases of this kind the transaction must be shewn to have been a matter of bargain.

(*u*) In *Muskerry* v. *Chinnery*, 3 Law Rec. (N.S.) 290, 297, and in H. of L. 7 Cl. & F. 1.

(*v*) 15 Beav. 408. See *In re Foster and Lister*, 6 Ch. D. 89.

(*w*) *Goodright* v. *Moses*, 2 W. Bl. 1019.

(*x*) 3 & 4 Will. 4 c. 74.

(*y*) *Greene* v. *O'Kearney*, 2 Ir. C. L. R. 267; *Tarleton* v. *Liddell*, 17 Q B. 390; *Currie* v. *Nind*, 1 My. & Cr. 17; *Hewison* v. *Negus*, 16 Beav. 594; *Teasdale* v. *Braithwaite*, 4 Ch. D. 85, 5 Ch. D. 630; *In re Foster and Lister*, 6 Ch. D. 87; *Shurmur* v. *Sedgwick*, 24 Ch. D. 597. See post, pp. 289 et seq.

(*z*) *Ball* v. *Burnford*, Prec. Ch. 113.

(*a*) Sir Nathan Wright. (*b*) See ante, pp. 266, 267.

Ex parte Cox.

In *Ex parte Cox* (*c*) a husband and wife, while the wife was an infant, conveyed a freehold house of the wife to a purchaser for value. The wife did not acknowledge the deed; the husband received the purchase-money. The purchaser contracted to sell the house, and his sub-purchaser required the concurrence of the wife, then of age. The wife gave her concurrence, after the husband in consideration of that had [* 286] executed a bill of sale of * his furniture to a trustee for her. The bill of sale was duly registered, and possession of the furniture was taken by the trustee, although left in the house occupied by the husband and wife. The husband afterwards went into liquidation. It was held by Bacon, C.J., that the transaction was a bargain by the husband with the wife to enable him to perfect the title of the purchaser from him of that estate which was the wife's, and which, by reason of the deed which purported to convey it not having been acknowledged by her, had never ceased to be her estate. He bought her concurrence in, and confirmation of, the conveyance, and in exchange for it he agreed to transfer his furniture to a trustee for her. That was no fraud on his creditors. The fact that he was insolvent at the time did not render him incompetent to purchase the confirmation of his wife.

Wife's concurrence part of the bargain.

If the husband is the sole agent, and, without any previous negotiation, merely obtained his wife's assent to the execution of the deed, and used it solely for the purpose of putting the property out of the reach of his creditors, the transaction will, subject to the question of the amount of charge on her property, be set aside. Where the transaction originates with the wife's friends, and is entered into for the purpose of paying off all the husband's debts, the settlement will be good (*d*); and an obligation entered into some time afterwards by the husband will be valid against creditors if in pursuance of a binding agreement made at the time of the wife's joining in the sale or mortgage (*e*).

The wife's concurrence must have been part of the bargain, and circumstances of fraud will vitiate the

(*c*) 1 Ch. D. 302.

(*d*) *Carter* v. *Hind*, 22 L. T. 116, per Wood, V.C. (Lord Hatherley); see also *Muskerry* v. *Chinnery*, Ll. & G. (t. Pl.) 182, S. C. on appeal as *Sheehy* v. *Muskerry*, 7 Cl. & F. 1.

(*e*) *Clerk* v. *Nettleship*, 2 Lev. 148, where the agreement seems to have been merely parol, but it was before the Statute of Frauds.

transaction against creditors (*f*); but where husband and wife having a joint power of appointment, remainder to the husband in fee, exercised this power so as to raise the purchase-money for another estate, which was settled in the same manner, this settlement was held not voluntary (*g*).

* In the very early case of *Goodright* v. *Moses* (*h*) Joshua Reade, tenant for life of the estate in question, Elizabeth, his daughter, tenant in tail in her own right, and her husband, Thomas Harris, covenanted to levy a fine (afterwards duly levied) and declared the uses to trustees and their heirs, in trust, as to the rent and profits, to Joshua Reade for life; and after his decease, to be applied for the support and maintenance of Thomas Harris and Elizabeth his wife, and their children, during the life of the said Thomas Harris; and after his decease for the maintenance of Elizabeth Harris and her children during her life, and at her death on trusts for the children and heirs of Elizabeth Harris. This settlement was held voluntary, and void against a subsequent purchaser. [* 287] *Goodright* v. *Moses.*

In *In re Foster and Lister* (*i*) this case was commented upon and dissented from by Sir G. Jessel, M.R. His Lordship pointed out that the question whether value was or was not given by the husband was not even argued, or referred to in the judgment; and that the case could not, therefore, be considered a decision on the point.

In *Currie* v. *Nind* (*k*) a married woman conveyed and appointed land (of which she was tenant for life, with remainder subject to her general power of appointment, remainder over) to a mortgagee to secure a sum of money, and, subject thereto, to her husband and herself for their joint lives and the life of the survivor; and after the decease of the survivor, in case there should be any daughters or younger sons of the marriage, upon trust to sell and divide the produce among them, with remainder to the general appointment of the wife, remainder to her right heirs. The hus- *Currie* v. *Nind.*

(*f*) *Acraman* v. *Corbett*, 1 J. & H. 410, 422–3; *Carter* v. *Hind*, 22 L. T. 116; and see *Doe* v. *Rolfe*, 8 A. & E. 650.

(*g*) *Acraman* v. *Corbett*, I. J. & H. 410, 420; see also *Doe* v. *Parratt*, 5 T. R. 652.

(*h*) 2 W. Bl. 1019.

(*i*) 6 Ch. D. 90–92.

(*k*) 1 My. & Cr. 17.

band and wife afterwards joined in selling the estate, and the mortgage was paid off out of the purchase-money, and they all released their interest to the purchaser. It was held, that so far at least as regarded the provision for daughters and younger sons, the settlement was voluntary; and that the purchaser could, under 27 Eliz. c 4, make a good title on a subsequent sale by him, without shewing that there were no daughters or younger sons of the marriage.

This case was also carefully examined in *In re Foster and Lister* (*l*). Sir G. Jessel, M.R., shewed that the [* 288] question of value * or no value given by the husband and wife was not really raised or decided in that case, and that it was plainly a voluntary settlement.

Butterfield v. *Heath.*

In *Butterfield* v. *Heath*, (*m*) much the same point was decided. There husband and wife joined in executing a post-nuptial settlement of the wife's property on the husband for life with remainder to the wife for life, and after the decease of the survivor, for all the issue of the marriage in such manner as the husband and wife should jointly appoint; and in default of such appointment, to all the children of the wife as tenants in common in fee simple, with cross-remainders between them, and in default of such childen to the husband in fee.

Husband and wife subsequently mortgaged the property for a sum of £2500, with a power of sale, and without regard to the limitations of the settlement, and six months afterwards conveyed it to the plaintiffs as trustees, on trust to sell and distribute the proceeds of such sale among the creditors of the husband. The post-nuptial settlement was held voluntary against the plaintiffs as purchasers (*n*).

From this case also Sir G. Jessel, M.R., dissented in the case of *In re Foster and Lister* (*o*), holding that the settlement was for value, and not voluntary. His Lordship pointed out that the husband gave value and purchased for value that which he became entitled to under the settlement. The wife gave value by giving up her estate in fee, subject only to her husband's estate dur-

(*l*) 6 Ch. D. 92–95.
(*m*) 15 Beav. 408.
(*n*) On the question of the trustees being purchasers, see ante, pp. 229 et seq.
(*o*) 6 Ch. D. 95–96.

ing coverture and estate by the curtesy; instead of this, she cut her estate down to an estate for life.

Hewison v. *Negus* (*p*), as stated by Lord Romilly, M.R., was as follows:—The settlement was post-nuptial, and was made by the husband of the first part, the wife of the second part, and two trustees of the third part. After reciting that the wife was entitled to a vested reversion in fee simple in one moiety of certain freehold and copyhold hereditaments, and that she and her husband had agreed to settle the same, the deed witnessed that they granted, * released, and confirmed [* 289] to the trustees the freehold hereditaments (subject to the estate of the tenant for life), upon trust to pay the rents and profits of them to E. A. Negus, the wife, for her separate use, and without anticipation, upon her sole receipt; and subject thereto, to the husband for his life; and after the decease of the survivor for such persons as E. A. Negus should by will appoint, and in default of appointment, to her children, as tenants in common in fee simple, with cross-executory limitations, in case of any one of them dying under twenty-one and without issue. The deed then contained a covenant by the husband to surrender the copyhold to the trustees on the trusts of the settlement, and the usual clauses to be found in such settlements (*q*). *Hewison* v. *Negus.*

His Lordship said he entertained no doubt, upon the full consideration of this settlement, that it was executed by the wife for valuable consideration, and distinguished the case from *Goodright* v. *Moses* (*r*) and *Currie* v. *Nind* (*s*), and from *Butterfield* v. *Heath* (*t*), which he had himself decided about twelve months before. He said, "It is clear, both on principle and authority, that a wife may in many respects enter into a contract for valuable consideration with her husband;" and the converse is true, "that a husband may become a purchaser from his wife of property belonging to her;" and thought the surrender by the husband of his right to receive the rents and profits of the hereditaments

(*p*) 16 Beav. 594.

(*q*) See also *Muskerry* v. *Chinnery*, Ll. & G. (t. Sug.) 185 S. C. (House of Lords) as *Sheehy* v. *Muskerry*, 7 Cl. & F. 1, and see S. C. coram L. C. Sugden, 3 Law Rec. (N.S.) 290, 297; *Greene* v. *O'Kearney*, 2 Ir. Com. Law, 267; and see *Cracherode* v. *Hallam*, post, Appendix No. IX.

(*r*) 2 W. Bl. 1019; et supra.

(*s*) 1 My. & Cr. 17; et supra.

(*t*) 15 Beav. 408; et supra.

during coverture, and his giving his wife a sole and exclusive power over them, was a valuable consideration sufficient to support this settlement. This decision was affirmed by the Lords Justices, who considered the settlement was a bargain for value between the husband and wife; and therefore good against a subsequent purchaser (*u*).

Teasdale v. *Braithwaite.*

In *Teasdale* v. *Braithwaite* (*v*) real estate was devised to an unmarried woman, with an expression of wish that, if she should marry, she should, before marrying, settle the estates for her separate use for life and to [* 290] uses as she should by will and * notwithstanding coverture appoint. She married, and, after a child was born, she and her husband, by deed acknowledged by her, conveyed the estates to trustees upon trust for the wife for life, remainder to the husband for life, remainder to the children of the marriage as the husband and wife should jointly by deed or as the survivor should by will appoint; and in default of appointment to the children equally; and, if there was no child, to the wife in fee if she survived her husband, and, if not, to her brothers absolutely. The husband and wife, by deed acknowledged by her, afterwards mortgaged the estates without notice of the settlement.

It was held by Bacon, V.C., following *Hewison* v. *Negus* (*w*), and affirmed by the Court of Appeal (*x*), that the settlement was for value, and good against the subsequent mortgagee. James, L.J., said: "The Vice-Chancellor correctly puts it thus: 'It is settled that if husband and wife, each of them having interests, no matter how much, or of what degree, or of what quality, come to an agreement which is afterwards embodied in a settlement, that is a bargain between husband and wife which is not a transaction without valuable consideration.'"

In re Foster and Lister.

The authorities on this subject were all carefully reviewed in the case of *In re Foster and Lister* (*y*) by Sir G. Jessel, M.R.

In that case freeholds belonging to the wife in fee

(*u*) 22 L. J. Ch. 655.
(*v*) 4 Ch. D. 85, S. C. 5 Ch. D. 630.
(*w*) 16 Beav. 594.
(*x*) 5 Ch. D. 630.
(*y*) 6 Ch. D. 87.

were by post-nuptial settlement, dated the 5th of December, 1857, settled by husband and wife, by deed acknowledged by her, upon trustees to the use of the wife for life, and after her decease to the use of such persons as she should by will appoint, and in default of appointment to the use of her children, with power to her during her life to lease them at a rack rent, and with a power of sale and exchange in the trustees with her consent. The freeholds were afterwards mortgaged by husband and wife by deed acknowledged by her.

Sir G. Jessel, M.R., held that the settlement was for valuable consideration. His Lordship said: "The only question before me is whether the indenture of the 5th of December, 1857, is a settlement made for value, or is voluntary, which depends, as I understand, simply upon two things: first of all, upon the construction of the settlement itself; and secondly, upon the law as to what a *voluntary settlement is. First of all, on the [* 291] construction of the settlement itself, independently of the question whether the mere concurrence of the husband, his concurrence being necessary for the conveyance of the wife's estate, is value on his part, there arises also the question whether he did not give up something. It is not a voluntary settlement if there is anything in the shape of consideration which can be called value. What, then, does the husband give up? There were children of the marriage at that time; consequently, the husband was entitled by law to an estate for the remainder of his life as tenant by the curtesy. Thus the wife was entitled to the fee simple, subject, of course, to those interests in the husband. But she had no power to convey the fee simple, or to make any lease of any part of it, or to sell it without his concurrence. That was their position before the settlement. What is their position after the settlement? The husband loses his estate by the curtesy. He does retain, in a sense, his estate during the coverture, for, oddly enough, the limitation (whatever they intended) to the use of the wife is only during her life, without impeachment of waste, but it does not say for her separate use. The husband gives up not only the estate by the curtesy, but also the power of preventing the wife from alienating the estate during his life, so that, if she died in his lifetime, it would descend to the heir-at-law, most probably his child, as he had several children by her."

"On the other hand, what is the wife's position?

The wife is reduced from being an owner in fee to a life estate, with a testamentary power of appointment, the estate going in default to her children. But she gains several things—a power of alienation in this sense, that she has the right to lease the property at a rack rent, which is reserved to her alone, and which is a valuable right, and she has a right to concur in a sale without her husband concurring at all. That power, which was in the husband, is now transferred to trustees, who may sell the life estate. How can anybody doubt that the positions of husband and wife were most materially altered by this settlement, and that what the husband gave to the wife was value as between him and his wife, and what the wife gave up was also value on her part?"

[* 292] *"As a question of principle, this is a bargain between husband and wife, altering their relative positions as to the estate, and their relative rights and interests in the estate. What one gave up the other acquired, subject to default in exercising the power of appointment, which would carry it to the children. That being so, if there were no authority on the question, I should have said it was quite clear that it was an agreement lawful between husband and wife, and that the husband gave value, and that the wife gave value, and that therefore the settlement was one for valuable consideration, and was not within the statute, which only applies to settlements where there is no valuable consideration at all."

Shurmur v. *Sedgwick.*

This case has been followed in *Shurmur* v. *Sedgwick* (*z*). In that case a married woman, entitled under a will to freehold and leasehold property for her separate use, joined her husband in settling the same. The husband and wife conveyed the freeholds, and the husband alone demised the leaseholds, subject to a payment of 1*s.* yearly if demanded, to trustees upon trust for the wife for life for her separate use, remainder to her husband for life, remainder to their children, if any, and the ultimate remainder to the wife absolutely. Two years afterwards, there being no issue of the marriage, the husband and wife mortgaged the property.

It was held by Bacon, V.C., that as the husband gave no consideration for the settlement, and as the trustees

(*z*) 24 Ch. D. 597; and see *Schreiber* v. *Dinkle*, 54 L. J. (N.S.) Ch. 241, S. C. affirmed W. N. (1886) 78.

of the leaseholds undertook no liability beyond the nominal payment of 1*s.* if demanded, the settlement was clearly void against the mortgagee. It could not be argued that as the husband gave up his estate by the curtesy he gave up anything; for the wife could sell her estate, or a mortgagee from her could, without her husband's consent, and so could defeat her husband's estate.

Same principles in Ireland.

The same principles have been recently held to apply in Ireland, where *In re Foster and Lister* (*a*) has been followed, in two cases under the Act of 10 Car. 1, sess. 2, c. 3 (*b*), which corresponds to 27 Eliz. c. 4.

When wife has whole estate, her concurrence not valuable.

Where the property stands limited to trustees in trust for the *wife for life, with remainder in trust [* 293] for such persons as she may appoint by will or deed, the whole estate and power of disposition are in her alone, so that any settlement of it by her must be voluntary (*c*); and where the limitations themselves do not shew that the settlement was a matter of contract and exchange, the *mere* consent of the wife to it (*d*) does not make it valuable (*e*).

Atkinson v. *Smith.*

But where (*f*) husband and wife tenants by entireties in fee simple, mortgaged by feoffment and fine, and by the proviso for redemption the land was to be reconveyed to the husband and wife and their heirs, or to such other persons or person, and for such intents and purposes as the husband and wife, or the survivor of them or the heirs or assigns of such survivor, should nominate, direct, or appoint, and on paying off the mortgage a reconveyance was taken to the use of the wife for life, with remainder to the use of the husband for life, with remainders in favour of a daughter and her children; Lord Chelmsford held that the limitations of the reconveyance were not voluntary, and not void against a subsequent purchaser. Neither the mortgage nor the limitations on the reconveyance would have been good without the wife's concurrence, and

(*a*) 6 Ch. D. 87.
(*b*) *Lynch* v. *Lynch*, 4 L. R. Ir. 210; *In re Bell's Estate*, 11 L. R. Ir. 512.
(*c*) *Currie* v. *Nind*, 1 My. & Cr. 17; *In re Foster and Lister*, 6 Ch. D. 87.
(*d*) Under the statute 3 & 4 Will. 4, c. 74.
(*e*) Ante, pp. 284, 285.
(*f*) *Atkinson* v. *Smith*, 3 De G. & J. 186; but see now 45 & 46 Vict. c. 75, and *In re March*, 24 Ch. D. 222, S. C. 27 Ch. D. 166.

Unless necessary or contracted for.

though it will be seen she was a considerable gainer by the latter, still she gave *something* in exchange.

Husband's money expended on wife's land

Money laid out by the husband on land devised to his wife for life, remained to her children, or in default, &c., to her in fee, has been held a good consideration for a conveyance of it to the use of the wife for life, remainder to her children in fee, and, if no child, to the husband absolutely (*g*).

Contract as to wife's separate estate.

Where (*h*) a wife was entitled to certain property for life for her separate use, remainder to the husband for life, with remainder to their children as they should appoint, and she conveyed her life estate to trustees for the benefit of her children, and the husband covenanted to assign his life interest if he should survive his wife, it was held on appeal (*i*), that this was such [* 294] a contract as could *be enforced by the children against their father surviving his wife. It was said the wife had a complete estate vested in her, independently of her husband, which she might have sold for value to a stranger, and with respect to which she, therefore, stood in the position of any person in the community possessed of property. Her husband had the same ability in respect of his life estate, contingent on his surviving her. They were quite competent to contract with each other, and they agreed to do so for the benefit of the children; the wife to make her estate an immediate provision for them (whom the husband was legally bound to maintain), and the husband to make a provision for them, in the event, of his surviving her, and of which he would not be able to deprive them; and that this was not a voluntary settlement, but a contract for valuable consideration, which the children, being equally purchasers (*k*), were entitled to enforce.

Settlement giving the same interests.

Of course a settlement by husband and wife, whereby they merely take such interests as they would have been respectively entitled to without any settlement, cannot but be voluntary (*l*).

(*g*) *Crofts* v. *Middleton*, 2 K. & J. 194 S. C. 8 De G. M. & G. 192.

(*h*) *Joyce* v. *Hutton*, 12 Ir. Ch. Rep. 71.

(*i*) Reserving the decision of the Master of the Rolls, 11 Ir. Ch. 123.

(*k*) *Davenport* v. *Bishopp*, 2 Y. & C. Ch. 451, 460, S. C. 1 Phil. 698; post, pp. 336; pt. iv. ch. iv.; and see *Greene* v. *O'Kearney*, 2 Ir. C. L. Rep. 267.

(*l*) *Holloway* v. *Headington*, 8 Sim. 324; *Acraman* v. *Corbett*, 1 J. & Hem. 410, ante, pp. 286, et seq.; *Shurmur* v. *Sedgwick*, 24 Ch. D. 597, ante, p. 292.

Consideration moving from husband.

It will be seen from these cases that a settlement between husband and wife of the wife's property will be deemed made for valuable consideration if the husband can be shewn to have given up any interest in that property. In *Teasdale* v. *Braithwaite* (*m*) the wife was seized in fee of the real estate and not as her separate property, so that her husband's consent to her alienation of it was necessary. So in *In re Foster and Lister* (*n*) the wife, as seised in fee could not convey that estate in fee, or lease any part of it, without her husband's concurrence; and therefore the estate by the curtesy of the husband was a thing which he could bargain with.

It may have been a question before 1883, whether the *mere* concurrence of the husband could operate to create a valuable consideration (*o*), quite apart from his giving up any interest.

Importance of such cases greatly lessened by Married Women's Property Act, 1882.

The importance of this class of cases has [295] been very greatly lessened by the Married Women's Property Act, 1882. By this Act a woman has, holds, and can dispose of all property, real or personal, as her separate property (*p*) which belongs to her at her marriage, or which she acquires or which devolves on her after her marriage, if she has married after 1882; and can so have, hold, and dispose of all property her title to which has accrued after 1882 if she married before January 1, 1883.

But it seems clear that the right of a husband married after 1882 to alienate his wife's chattels real by act inter vivos, and the necessity for his concurrence in her disposition of the legal estate in real property, are now destroyed.

The question has not yet been decided, whether or not the husband will, under this Act, still have an estate by the curtesy; it is conceived that he is not deprived by this Act of such a right in cases in which he was before this Act entitled to it (*q*).

(*m*) 4 Ch. D. 85, S. C. 5 Ch. D. 630.
(*n*) 6 Ch. D. 87.
(*o*) 6 Ch. D. 87; but see now 45 & 46 Vict c. 75, and *Goodchild* v. *Douglas*, 3 Ch. D. 652, 654.
(*p*) 45 & 46 Vict. c. 75, ss. 2, 5; Griffith, 5th ed. 14, 42, 58.
(*q*) See Griffith, 5th ed. 10, 58, 59; but see Wolstenholme, Conv. Acts, 4th ed. 9.

The case of *Shurmur* v. *Sedgwick* (*r*) would appear to be a leading authority on this question, and decides that even if the husband has an estate by the curtesy in his wife's separate property, that is not an interest with which he can bargain so as to support a post-nuptial settlement by the wife of her property as made for value.

In the case, therefore, of a woman who has married after 1882, a post-nuptial settlement by her cannot now be supported as made for valuable consideration on the ground of a bargain between her and her husband to modify *his* interest in her property; inasmuch as he now acquires by virtue of the marriage no interest whatever in her property (*s*), and therefore acquires no interest with which to bargain.

Bargain may still exist if woman married *before* 1883.

Of course, the principles of *Teasdale* v. *Braithwaite* (*t*), and *In re Foster and Lister* (*u*) will still apply in any case in which the marriage took place before 1883, [* 296] and the married woman *first* *acquired her interest in the property the subject of the settlement before 1883 (*v*).

Wife's property which husband could not get at without aid of equity.

All property, real or personal, of the wife's was considered as belonging to the husband in her right; but as to such of it as he could not obtain complete possession of without the assistance of a Court of equity, that Court would not assist, nor, if the wife should dissent, would it allow, the husband to recover or receive such property without his settling on his wife and children such a proportion as, under the circumstances, the Court considered right (*w*).

Effect of Married Women's Property Act. 1882.

By the Married Women's Property Act, 1882 (*x*), the operation of this right of a married woman to an equity to a settlement is entirely confined to the case of such women as have married before January 1, 1883, and whose title to the property in question has *accrued* be-

(*r*) 24 Ch. D. 597.
(*s*) 45 & 46 Vict. c. 75, s. 2; supra, p. 223.
(*t*) 4 Ch. D. 85.
(*u*) 6 Ch. D. 87.
(*v*) 45 & 46 Vict. c. 75, s. 5; *Reid* v. *Reid*, 31 Ch. D. 402; and *In re Tench's Trusts*, 15 L. R. Ir. 406.
(*w*) *Elibank* v. *Montolieu*, 5 Ves. 737; *Sturgis* v. *Champneys*, 5 My. & Cr. 97; *Gleaves* v. *Paine*, 1 De G. J. & S. 87; see 1 Wh. & Tu. L. C. 6th ed. 486 et seq.; *Knight* v. *Knight*, L. R. 18 Eq. 490.
(*x*) 45 & 46 Vict. c. 75, ss. 1 (1), 2, 5; and see Griffith, 5th ed. 42, 57, 110–111; Edwards & Hamilton, 243 et seq.; supra note (*v*).

fore that date. For *all* property which either belongs to a woman at the time of her marriage, or which she acquires or which devolves upon her after marriage, is, if she has married after 1882 by this Act declared to be her separate property.

This rule of equity—the wife's equity to a settlement—was founded on the principle that he who seeks equity must do equity (*y*); and the jurisdiction to compel the husband, or those claiming under him, to make a settlement, at first arose upon his coming to the Court for assistance. The right was personal to the wife, and might have been waived by her, even after she had taken steps to enforce it (*z*). Equity to settlement. Waiver of.

It appears that where a settlement has been made in pursuance of an order enforcing the wife's equity, the Court will support it as a good settlement for valuable consideration (*a*). Contracts founded on.

*In *Wheeler* v. *Caryl*, (*b*), on equity reserved, the [*297] question was, whether a settlement by Mr. C. on his wife, after marriage, was voluntary and fraudulent against creditors. Lord Hardwicke said, Mrs. C. was entitled, as daughter of Lord M., to a moiety of £12,000, secured by her mother's marriage settlement, subject to the contingency of being lessened by the birth of another daughter; a marriage was clandestinely had with Mr. C.; after that, Lord M. secured the £6000 on his estate, and Mr. C. made a settlement on his wife. She was entitled to £6000, and no evidence appears that her father intended her further bounty. There are general principles well known that marriage is a valuable consideration, and that post-nuptial settlements may, by other considerations, become good and for valuable consideration; and that if a young lady is entitled to a trust term, which the husband cannot lay hold of and possess nor get at without the assistance of this Court, if the trustees will not raise the portion, and the husband comes for aid here, the Court will decree an adequate settlement to be made on the wife, and will sup- *Wheeler* v. *Caryl*. Post-nuptial settlement of property subject to, good.

(*y*) *Bosvil* v. *Brander*, 1 P. Wms. 459; *Sturgis* v. *Champneys*, 5 My. & Cr. 97.

(*z*) See *Barrow* v. *Barrow*, 4 K. & J. 409, 424; Seton, 4th ed. 676, 680; *Stackpole* v. *Beaumont*, 3 Ves. 89; and see *Elworthy* v. *Wickstead*, 1 Jac. & W. 69; *Hedges* v. *Clark*, 1 De G. & S. 354; and *Britten* v. *Britten*, 9 Beav. 143.

(*a*) *Moor* v. *Eycault*, Prec. Ch. 22; post, p. t. iv. Ch. v.

(*b*) 1 Amb. 121.

port it as a good settlement, for valuable consideration. The Court has gone further ; if after marriage, the wife being entitled to such a portion, which the husband cannot touch without the aid of the Court, and the trustees will not pay it without the husband making a settlement ; if the husband does agree to it, and do that which the Court would decree, it is a good settlement against creditors.

Settlement of wife's equitable property when good against creditors or purchasers.

This is the point as to which this rule of equity—the wife's right to a settlement—is important with regard to the statutes of Elizabeth, viz., that a settlement by the husband of so much of his wife's equitable property as would have been enforced against him by the Court, if he had tried to obtain possession, will be considered as a binding settlement, good against his creditors or subsequent purchasers from him (*c*).

Case in Ireland.

In a case (*d*) in Ireland before Lord Plunket, a married woman was entitled to a third of a sum of £6000 charged on lands, and which had been appointed by [*298] will in her favour, in exercise of a *power to charge contained in a previous settlement. Before any of her share was paid, her husband conveyed to trustees £1200, part of the said charge of £2000, in trust for his wife if she should survive him, and after her death for the issue of the marriage. Afterwards the husband assigned the charge to a creditor of his own to secure a debt and a further advance, and the issue of the marriage, being ignorant of the settlement and of their rights thereunder, joined with their father in this deed for the purpose of giving a further security. The creditor to whom the charge was assigned was, it appears, aware of the settlement (*e*). It was held that the settlement on the wife and children was good against the creditor claiming as a purchaser.

His Lordship said it was quite untenable to say that this deed was a voluntary assignment ; it was made under a conscientious obligation, and that settlement cannot be considered as voluntary or fraudulent which the party might have been compelled by a Court of equity to execute. The husband there had done, not merely

(*c*) *Moor* v. *Rycault*, Prec. Ch. 22 ; *Hinton* v. *Scot*, Mosely, 336 ; *Middlecome* v. *Marlow*, 2 Atk. 520 ; and see *Montefiore* v. *Behrens*, L. R. 1 Eq. 171.

(*d*) *M'Clintock* v. *Ashe*, 2 Law Rec. (N.S.) 45.

(*e*) See S. C. in the C. B., 1 Law Rec. (N.S.) 145.

an act which he was under a moral obligation to perform, but one which he might have been compelled to do ; and the question was, whether this could be considered a voluntary and fraudulent assignment, being of a sum of money to which he was entitled in right of his wife as a charge upon certain lands ; and there was intrinsic evidence on the face of the matter itself to shew that the deed was the consequence of a previous contract. The husband says, "You could compel me to make a settlement, but if you give me £800 I will make a settlement of the residue ;" this seems a very fair arrangement, and cannot be said to be voluntary or fraudulent (*f*).

The amount which can thus be validly settled by private agreement between the parties is regulated to a certain extent by the amount which the Court would have ordered to be settled at the suit of the wife, and must not include more than that. As the equity of the wife does not extinguish the legal right of the husband, and his existing creditors are entitled [*299] to all rights over the property which he could honestly have exercised, it is not too much to say that any settlement materially exceeding what the Court would have enforced would be void against them as to the excess (*g*) ; though it might have been thought that, taking into consideration the uncertainty of the parties, as to how much the Court might be willing to have settled, and also the expenses of a suit saved by the private arrangement, the amount settled under such circumstances would not be closely scrutinized. The amount thus protected.

In *Spirett* v. *Willows* (*h*), however, where there was a post-nuptial settlement of property, out of which, as was decided in the same suit (*i*), the wife was entitled to have three-fourths settled on herself and her children, the settlement was set aside as void against the husband's creditor's, the question as to the wife's equity to a settlement being subsequently decided (*i*). *Spirett* v. *Willows*.

On the other hand, it is evident that any settlement made by or on a married woman of property with re-

(*f*) It was also decided in the Court below that the subject of the settlement was personalty, and therefore on that ground also not within the statute.

(*g*) See *Pringle* v. *Hodgson*, 3 Ves. 617, 1 Fonbl. Eq. 275 ; Seton, 4th ed. 680.

(*h*) 3 D. J. & S. 293.

(*i*) 13 W. R. 1034, S. C. L. R. 1 Ch. 520.

Any settlement on wife bars her equity.

gard to which she had an equity to a settlement, will extinguish that equity although she takes nothing by it; for such a settlement to be valid must be acknowledged by her under the Fines and Recoveries Act (*k*), and will therefore be a waiver of her right. Besides this, the mere transfer of the property for such a purpose will bar her equity, for it will dispose it so that it can be got at without the assistance of herself or the Court; in fact, the reduction into possession by the husband of his wife's choses in action must always bar her right to a settlement; and any settlement of them made subsequently by the husband will not be good against creditors (*l*).

Equity dies with her.

Extends to children.

Although the wife may, up to a certain point, waive her right to a settlement, and her children cannot after that insist on it, and if she dies without asserting her right her children have no power of enforcing it, yet where the wife insists on her equity it will always be extended to her children; and when she has entered into a contract, or has obtained a decree for a settlement, [* 300] the interests *of the children will not be defeated if she die without waiving it (*m*).

Under control of Court.

The wife's equity to a settlement is an interest which the Court can and will control, and will not allow to be made an engine of fraud, or to be insisted on where it would be contrary to good conscience to do so; so that where a wife is indebted before marriage it will not be enforced against her creditors (*n*), although it would against her husband's (*o*); and where she had been a party to a fraud by which a purchaser had been induced to take the property supposing it freed from any claim of the wife's against it, she was held to be precluded from her equity (*p*).

Principle of Court.

The principle on which the Court acts is to let in the equity of the wife and children, and to that extent to exclude the husband's marital right but not to interfere

(*k*) 3 & 4 Will. 4, c. 74; but see p. 296.
(*l*) *Ryland* v. *Smith*, 1 My. & Cr. 53; 20 & 21 Vict. c. 57; *Warden* v. *Jones*, 2 De G. & J. 76. 87.
(*m*) *Murray* v. *Elibank*, 1 Wh. & Tu. L. C. 6th ed. 516 et seq.
(*n*) *Bonner* v. *Bonner*, 17 Beav. 86; *Barnard* v. *Ford*, L. R. 4 Ch. 247.
(*o*) *Spirett* v. *Willows*, L. R. 1 Ch. 520.
(*p*) *In re Lush's Trusts*, L. R. 4 Ch. 591.

with the marital right more than is necessary for that purpose (*q*).

The amount settled.

The old rule was to divide the fund equally between the wife and children on the one hand, and the husband, or those claiming under him, on the other (*r*). In modern times that rule has been considerably relaxed, and considerable latitude has been assumed by the Court (*s*). The present rule is for the Court to consider all the circumstances of the case, and to exercise its judicial discretion as to the amount to be settled (*t*). The Court in special cases will order the whole fund to be settled: as where the husband is insolvent or has deserted his wife, so that he is unable or refuses to maintain her (*u*) especially where the fund is small (*v*), or where *the husband has already [*301] received part of the fund (*w*); or where the separation has been caused by the wife's ill-health, and the husband does not contribute to her support (*x*).

Separation deeds

All deeds of arrangement entered into for the purpose of altering in any material degree the relation which the law establishes between husband and wife are attended with very great difficulty. They usually originate under circumstances of a distressing and serious nature, and they tend to sanction innovation on that relation from which both parties hoped to find the greatest degree of comfort and happiness (*y*).

There is no analogy in the eye of the law between the contracts entered into on the commencement of the

(*q*) *Walsh* v. *Wason*, L. R. 8 Ch. 482; *Croxton* v. *May*, L. R. 9 Eq. 404.

(*r*) *Beresford* v. *Hobson*, 1 Mad. 362; *Jewson* v. *Moulson*, 2 Atk. 423; *Worrall* v. *Marlar*, 1 Cox, 153; *Spirett* v. *Willows*, L. R. 1 Ch. 520; Seton, 4th ed. 680.

(*s*) *In re Suggitt's Trusts*, L. R. 3 Ch. 217, 218.

(*t*) *Taunton* v. *Morris*, 11 Ch. D. 781.

(*u*) *Brett* v. *Greenwell*, 3 Y. & C. Ex. 230; *Gardner* v. *Marshall*, 14 Sim. 575; *Gilchrist* v. *Cator*, 1 De G. & Sm. 188; *In re Cutler*, 14 Beav. 220; *Layton* v. *Layton*, 1 Sm. & Giff. 179; *Francis* v. *Brooking*, 19 Beav. 347; *In re Kincaid's Trusts*, 1 Drew. 326; *Dunkley* v. *Dunkley*, 2 De G. M. & G. 390; *In re Suggitt's Trusts*, L. R. 3 Ch. 216; *Boxall* v. *Boxall*, 27 Ch. D. 220.

(*v*) *Ward* v. *Yates*, 1 Dr. & Sm. 80; *Re Hooper's Trusts* 6 W. R. 824; *Re Groves' Trusts*, 3 Giff. 575.

(*w*) *Scott* v. *Spashett*, 3 Mac. & G. 599; *Ward* v. *Yates*, 1 Dr. & Sm. 80; *Re Merriman's Trusts*, 10 W. R. 334; Banning Mar. Sett. 52.

(*x*) *Croxton* v. *May*, Lr. 9 Eq. 404.

(*y*) *Jodrell* v. *Jodrell*, 9 Beav. 53, per Lord Langdale.

marital partnership and contracts entered into on the dissolution of that partnership.

Marriage settlements are protected as made on valuable consideration. An arrangement on separation, however, even after attaining the form of a deed of separation actually executed, is of itself a post-nuptial deed, and therefore a mere *voluntary* arrangement (*z*), but is not against public policy (*a*); and while it is still merely in agreement will not be enforced by the Court (*b*). But there may be other considerations moving between the parties which will support the deed against even the claims of creditors or purchasers (*c*).

are per se voluntary.

Other considerations to make them valuable.

Covenant of indemnity by trustees or a third person against wife's debts.

A covenant in a deed of this description, by the trustees of the deed, or by a third person (*d*), to indemnify the husband against the debts which the wife may contract after the separation, has always been regarded as a valuable consideration (*e*).

[* 302] * It has been said that the effect of such a covenant is not very great, for where a separation between husband and wife is made by deed or by mutual agreement, the husband, living apart from his wife and allowing her separate maintenance, is not liable to pay her debts; and this, speaking generally, is true; but such a covenant is not valueless, for questions may and do (*f*) frequently arise, notwithstanding a separate maintenance is provided for the wife. The husband, if sued, must prove the adequacy of the allowance and the due payment of it (*g*); and whether the allowance be sufficient according to the condition and fortune of the parties is in some cases for the decision of a jury (*h*).

(*z*) Ibid.

(*a*) *Hunt* v. *Hunt*, 4 D. F. & J. 221, 227; *Besant* v. *Wood*, 12 Ch. D. 605; *Cahill* v. *Cahill*, 8 App. Cas. 420.

(*b*) *Fitzer* v. *Fitzer*, 2 Atk. 511; *Clough* v. *Lambert*, 10 Sim. 178; *Westmeath* v. *Westmeath*, Jac. 126; *Vansittart* v. *Vansittart*, 2 De G. & J. 249; *Warrender* v. *Warrender*, 2 Cl. & F. 527; *Legard* v. *Johnson*, 3 Ves. 352.

(*c*) *Ruffles* v. *Alston*, L. R. 19 Eq. 539.

(*d*) *Compton* v. *Collinson*, 2 B. C. C. 377.

(*e*) *Stokes* v. *Stokes*, post, Appendix No. V.; *Seeling* v. *Crawley*, 2 Vern. 386; *Angier* v. *Angier*, Prec. Ch. 497; *Stephens* v. *Olive*, 2 B. C. C. 90; *The King* v. *Brewen*, 2 B. C. C. 93, n.; *Compton* v. *Collinson*, 2 B. C. C. 377; *Fitzer* v. *Fitzer*, 2 Atk. 511; *Worrall* v. *Jacob*, 3 Mer. 256, 269; *Elworthy* v. *Bird*, 2 S. & S. 381; *Gibbs* v. *Harding*, L. R, 8 Eq. 490, S. C. L. R. 5 Ch. 336.

(*f*) *Duffield* v. *Scott*, 3 T. R. 374.

(*g*) *Mizen* v. *Pick*, 3 M. & W. 481; *Nurse* v. *Craig*, 2 N. R. 148.

(*h*) *Hodgkinson* v. *Fletcher*, 4 Campb. 70; *Liddlow* v. *Wilmot*,

If the parties separate by mutual consent, they may make their own terms, which are binding on both so long as they continue the separation (*i*).

Questions may also arise as to whether the separation has been sufficiently notorious in the neighbourhood (*k*), for to make a separate maintenance absolve the husband from liability there must be, not necessarily a personal, but an implied, notice to the tradesmen, through the publicity of the separation. It is conceived that if a wife immediately on separation from her husband bought necessaries on credit from a tradesman with whom she had dealt before on credit, and who had no notice of the separation, her husband would be liable to the tradesman, notwithstanding an adequate allowance (*k*); but that in such a case the covenant of indemnity would enable the husband to recover from the trustees (*l*).

Of value to the husband.

Such a covenant may then be of value to the husband; it may afford him important protection and throw a burthensome obligation on the trustee; and it has been uniformly decided that a bonâ fide separation deed containing such a covenant is not voluntary (*m*), and it can be enforced, though the husband is willing to receive her back (*l*).

When wife can enforce covenant.

* A wife may in equity enforce a covenant [*303] entered into by her husband with the trustees of a separation deed between her and her husband, if she is beneficially interested in that covenant, and the trustees, on receiving a proper indemnity, refuse to sue (*n*).

Trustee for wife not now necessary.

It is conceived that under the Married Women's Property Act, 1882, a married woman can contract with her husband, just as with any other person (*o*); and therefore that a covenant *by* a trustee for her in such deed executed after 1882 will be unnecessary (*o*).

2 Stark, N. P. C. 86; *Emmett* v. *Norton*, 8 C. & P. 506; *Marshall* v. *Rutton*, 8 T. R. 545; *Worrall* v. *Jacob*, 3 Mer. 269; *Debenham* v. *Mellon*, 6 App. Cas. 24.

(*i*) *Eastland* v. *Burchell*, 3 Q. B. D. 436.

(*k*) *Todd v. Stokes*, 1 Ld. Raym. 444, Salk. 116; *Wallis* v. *Biddick*, 22 W. R. 76; *Eastland* v. *Burchell*, 3 Q. B. D. 432, 436; Lush, H. & W. 403.

(*l*) *Stokes* v. *Stokes*, post, Appendix No. V.

(*m*) *Worrall* v. *Jacob*, 3 Mer. 256.

(*n*) *Gandy* v. *Gandy*, 30 Ch. D. 57, 73, 74,

(*o*) Ante, p. 282; Griffith, 5th ed. 16, 20; Lush, H. & W. 401; Eversley, Dom. Rel. 467, 468.

Is covenant of indemnity by wife *alone* against her debts now for value?

It is a doubtful question whether the effect of that Act is to make a covenant by a woman married after 1882 to indemnify her husband against her future debts merely a voluntary covenant, or whether it will still be held to be a valuable consideration, so as to support a separation deed against creditors or purchasers. It may be said that as the Act does not destroy her husband's liability to maintain her, and as it does confer contractual power upon her in respect and to the extent of her separate property, this covenant will still be deemed a valuable consideration. On the other hand, the Act destroys the husband's interest in his wife's property, and also his liability for her debts, unless she can shew that she contracted as his agent, whether she is or is not living with him (*p*).

It was at one time held that a married woman having a separate maintenance might herself be sued for the debts she contracted (*q*); but even at that time this was called by Lord Alvanley "a very material covenant" (*r*), and was frequently decided to be a valuable consideration. Under the provisions of the Married Women's Property Act, 1882, every contract entered into by a married woman primâ facie binds her separate property (*s*); and renders her liable to be sued in respect thereof. To shift the liability from herself, she [* 304] must prove her * contract to be that of her husband's agent; whether she was or was not living with her husband at the time she contracted the debt.

Covenant also against claim for alimony.

Where the covenant is not against debts alone, but also against any claim of alimony, it makes the case stronger (*t*).

It is conceived that such a covenant, if entered into by a married woman in a separation deed after 1882, will be deemed a valuable consideration (*u*).

Conditional covenant.

And where in articles on separation the covenant by the trustees to indemnify the husband was conditional on the husband's performing a covenant entered into by him to secure a certain provision for his wife's ben-

(*p*) Key & Elphinstone, 2nd ed. vol. 2, 419.

(*q*) *Corbett* v. *Poelnitz*, 1 T. R. 5; overruled by *Marshall* v. *Rutton*, 8 T. R. 545.

(*r*) *Hyde* v. *Price*, 3 Ves. 446.

(*s*) 45 & 46 Vict. c. 75, s. 1 (2), (3), (4); see Griffith, 5th ed. 31–36.

(*t*) *Worrall* v. *Jacob*, 3 Mer. 256.

(*u*) 45 & 46 Vict. c. 75, s. 1 (2); see *Weldon* v. *Winslow*, 13 Q. B. D. 784; *Turnbull* v. *Forman*, 15 Q. B. D. 234.

efit, this covenant by the trustees, although to a certain extent conditional, was held to be a sufficient consideration to induce the Court to enforce the articles against the husband (*v*).

Agreement for deed containing all usual and proper clauses.

An agreement between a husband and his wife's father that the husband and wife should live apart, and that the husband should execute a deed of separation containing all usual and proper clauses, and securing an annuity for the maintenance of his wife and child, and that the expense of the agreement should be borne equally by the husband and the father, was decreed to be specifically performed as on sufficient consideration, inasmuch, as the deed prepared was in pursuance of the contract, and contained a covenant of indemnity to the husband against the wife's debts, and there was also the contract to pay the expenses of the agreement and deed; and as the child was under seven years of age it was reasonable that an arrangement should be made for its maintenance (*w*).

Nixon v. *Hamilton*, covenant by wife's trustees to support children.

In *Nixon* v. *Hamilton* (*x*), on separation, an annuity of £600 was given to the wife, and there was a covenant (*y*) by the trustees that the wife should well and truly provide for, support, and educate the five children of the marriage until their coming of age, marriage, death, or removal by the husband. As to this, *Lord Plunkett, Lord Chancellor of Ireland, said: "But as to the deed itself and the considerations stated on the face of it, no answer appears to me to have been made to the argument as to the covenant by the trustees. There is a positive covenant by the trustees on the part of Mrs. H. that the maintenance of the children should be paid for by her. Now, is not that quite sufficient to take this deed out of the ordinary case of voluntary settlements? The covenant is, not that the maintenance and support of the children is to come out of the annuity of £600; but it is a distinct and absolute covenant for the maintenance and support of the children; a covenant upon which the trustees would have been liable independently of the payment of the annuity of £600. It is said that no action could have been maintained by H. (the husband) on that covenant, unless he paid the [*305]

(*v*) *Wellesley* v. *Wellesley*, 10 Sim. 270, S. C. 4 My. & Cr. 575.
(*w*) *Gibbs* v. *Harding*, L. R. 8 Eq. 490, S. C. L. R. 5 Ch. 336. See 36 Vict. c. 12; *Besant* v. *Wood*, 12 Ch. D. 605; *Hart* v. *Hart*, 18 Ch. D. 622.
(*x*) 2 Dr. & Wal. 364. (*y*) Ibid. at p. 370.

annuity. I cannot accede to this, for it strikes me that such action would lie, and that the party bringing it would succeed."

Provision for reimbursement of wife's debts out of annuity.

But, on the other hand, a mere provision in a separation deed that the husband shall be at liberty to reimburse himself out of an annuity secured to the wife by the same deed, does not prevent that deed from being voluntary and void against subsequent purchasers. Such a provision gives him nothing which he had not got before; it is a mere right to keep back so much out of the voluntary gift which he had made (*z*).

Covenant by wife only.

It followed from this that where the wife had no separate property at the time she entered into the covenant, or only property settled to her separate use without power of anticipation, such covenant *by her* alone would not have been a consideration to the husband for an annuity given to the wife; for in that case (not having anything as to which she could contract except the annuity then given) her covenant could not bind her except as to that annuity (*a*).

And this is still the case if the wife enters into the covenant after 1882, and at that time has no existing separate property (*b*); for she cannot then enter into a binding contract.

Inhibition of Scotch Court.

[* 306] *A process of inhibition issued out of a Scotch Court on the part of a husband against his wife, after a separation, to prevent her charging his property with the payment of his debts, seems to be nothing more than a kind of notice to the public that the husband will not be answerable for her debts, and does not prevent the provisions of the separation deed from being voluntary against the husband (*c*).

Other considerations may support separation deeds.

A covenant to indemnify against the wife's debts is not the only consideration which will be allowed to support a deed of this kind.

Thus, it has been held that a release by the husband of his marital rights in all future-acquired property of

(*z*) *Cowx* v. *Foster*, 1 J. & Hem. 30; per V. C. Sir W. P. Wood.
(*a*) *Walrond* v. *Walrond*, Johns. 18.
(*b*) *In re Shakespear*, 30 Ch. D. 169; 45 & 46 Vict. c. 75, s. 1 (2), (4).
(*c*) *Willats* v. *Busby*, 12 L. J. Ch. 105.

the wife is a good consideration from the husband to support his claim to an annuity secured to him by a separation deed, and therein charged by the wife on her separate estate (*d*). Release of martial rights formerly for value.

So the release by the husband of his rights in his wife's property has been held to constitute a valuable consideration sufficient to support a covenant by the wife not to sue for a restitution of conjugal rights (*e*).

It is an undecided point whether, under the Married Women's Property Act, 1882, such a release by the husband will be any longer a valuable consideration. It is conceived that as by that Act the husband's marital rights in the property of his wife are entirely destroyed, such release will only be voluntary (*f*). Effect of Married Women's Property Act, 1882.

Where the husband has, by his misconduct, given his wife a right to separation and maintenance, if she chose to take proceedings against him in the proper Court, an allowance made to her by him in a separation deed will be looked on as a compromise of that claim of hers, and on valuable consideration. Compromise of suits for divorce, &c.

Thus in *Hobbs* v. *Hull* (*g*) the husband (the defendant) was indebted to the plaintiff in judments and otherwise; a separation took place between him and his wife, upon which occasion he *settled part [* 307] of his real estates to the yearly amount of £300 upon his wife for her separate maintenance, and on the children of the marriage. It appeared that, previously to the separation, the husband had been living in a state of adultery, and it was insisted, in answer to the bill filed by the judgment creditor to set aside the settlement as voluntary, that, since the wife was, in consequence of her husband's misconduct, entitled to a divorce à mensâ et thoro, and consequently to an allowance for alimony, there was a valuable consideration, which supported the deed against the husband's creditors. And so it was determined, the Master of the Rolls thas expressing himself: "I am now bound to decide the question whether, the husband having behaved so ill as to entitle the wife to obtain a divorce in *Hobbs* v. *Hull*.

(*d*) *Logan* v. *Birkett*, 1 My. & K. 220.
(*e*) *Marshall* v. *Marshall*, 5 P. D. 22, 23; *Clark* v. *Clark*, 10 P. D. 188.
(*f*) Ante, pp. 223, 295.
(*g*) 1 Cox, 445.

the spiritual Court à mensâ et thoro, and to have a proper allowance from him, if the wife, instead of strictly prosecuting that right, meet the husband on the threshold, and say she will accept the maintenance proposed by him without litigation, whether this can be said to be such a voluntary act as to be fraudulent against creditors. Surely this settlement can never be said to be without consideration. A husband and wife may certainly, in particular situations, treat together effectually if they treat on fair and reasonable terms. When the wife in this case agrees to accept this settlement instead of resorting to the enforcing of her rights in the Ecclesiastical Court, surely she is giving up something for it (*h*). I am, therefore, very clearly of opinion that this is not one of those agreements which the statute of Elizabeth meant to prevent."

Wilson v. *Wilson.*

In the case of *Wilson* v. *Wilson* (*i*), in the House of Lords, it was held that the stopping by the wife of a suit which she had instituted against her husband for nullity of marriage was a sufficient consideration to him for articles of separation; which were accordingly decreed to be carried into effect, although there was no covenant to indemnify the husband against the wife's debts, and although it did not appear that the wife [* 308] could have obtained *a decree for alimony. Lord Cottenham said: "One part of the consideration is the stopping of the suit in the Ecclesiastical Court. The stopping of those proceeding seems to have been an important object to Mr. W.—of the reason for which he was the best judge—and that alone was a sufficient consideration. In *Bateman* v. *Countess of Ross* (*k*) there was a suit pending for divorce. Why is not the compromise of such a suit to afford consideration for an agreement? Is it desirable that the parties should be compelled to bring such complaint in the Ecclesiastical Court to public discussion?"

Contract not to sue for restitution of conjugal rights.

This case established the principle that it was not illegal, or contrary to public policy, that husband and wife should bind themselves by deed that neither of them should institute a suit for the restituton of con-

(*h*) See *Nixon* v. *Hamilton*, 2 D. & Wal. 364, 388; *Nunn* v. *Wilsmore*, 8 T. R. 521.

(*i*) 1 H. L. C. 538, S. C. 5 H. L. C. 40, and cases there cited; and *Haworth* v. *Bostock*, 4 Y. & C. 1, S. C. 9 Cl. & F. 59; *Gibbs* v. *Harding*, L. R. 5 Ch. 336; Fry, Sp. Pf. 2nd ed. 648.

(*k*) 1 Dow, 235.

jugal rights. This principle has been repeatedly followed (*l*).

In *Besant* v. *Wood* (*m*) Sir G. Jessel, M.R., pointed out that the right of a married woman to contract not to sue for restitution of conjugal rights is a corollary from her right to compromise such suit, and that such contract was binding on her.

So in *Hart* v. *Hart* (*n*) Kay, J., held that the main consideration for an agreement to execute a deed of separation between husband and wife was the compromise of litigation; and in *Rose* v. *Rose* (*o*), following *Besant* v. *Wood* (*m*), Sir G. Jessel, M.R., held that a contract by a married woman to compromise a suit was a perfectly binding agreement on her.

Such contract, however, whether it contains a covenant by the trustees of the wife, or merely by the wife alone, must be duly executed by her. That is to say, it must be executed by her with the formalities which would be required if she entered into a contract for value with any other person than her husband respecting the same subject-matter.

Contract must be *duly* executed by wife.

*So a stipulation (in an agreement to compromise a suit for restitution of conjugal rights) that a married woman should release part of a jointure rent-charge after her husband's death secured upon his real estate not settled to her separate use, to which she was entitled by ante-nuptial settlement, which was not duly acknowledged by her, although duly executed by her husband, was held not binding on her (*p*). [*309]

And, it must be observed that the necessary limit to this power of a married woman to bind herself—that is, her separate property—in a separation deed is this. She can bind herself—that is, her separate property—in any case in which she can bind that property if she were dealing with any person other than her husband.

(*l*) *Rowley* v. *Rowley*, L. R. 1 H. L. Sc. 62; *Stanes* v. *Stanes*, 3 P. D. 42; *Marshall* v. *Marshall*, 5 P. D. 19; *Besant* v. *Wood*, 12 Ch. D. 605; *Hart* v. *Hart*, 18 Ch. D. 670; *Rose* v. *Rose*, 8 P. D. 98; *Cahill* v. *Cahill*, 8 App. Cas. 431; *Clark* v. *Clark*, 10 P. D. 188.
(*m*) 12 Ch. D. 605.
(*n*) 18 Ch. D. 685.
(*o*) 8 P. D. 98.
(*p*) *Cahill* v. *Cahill*, 8 App. Cas. 420.

Under the Married Women's Property Act, 1882, a contract entered into by her now binds both her separate property at the date of that contract, and also all her future acquired separate property (*q*). But a married woman cannot enter into a valid covenant or contract in a separation deed under this Act unless at that time she has some existing separate property (*r*).

Theory of separation deed.

The theory of a separation deed, said Lord Westbury in *Hunt* v. *Hunt* (*s*), "is that it is a contract between the husband and wife through the intervention of a third party—namely, the trustee; and the husband's contract for the benefit of the wife is supported by the contract of the trustee on her behalf." So a married woman was not liable upon such a deed until she had executed it, or had unquestionably adopted it. Her position, in an ordinary separation deed, until she had so adopted it, stood on a different footing from that of her trustees, who were liable to answer for any breach of it by her (*t*) so soon as they had executed it. It is conceived that with regard to deeds executed after 1882 this doctrine will no longer obtain.

Claim for alimony.

It seems doubtful whether a wife's relinquishing her claim to a decree for alimony is of itself a consideration [* 310] which * will support a deed against existing creditors. Their claim to the husband's property is superior to that of the wife; she has a right to a maintenance out of that fund, and in the event of her being compelled by her husband's misconduct to live apart, the proper Court will decree her to be paid a sum for that purpose to her separate use; but that decree is only against the person of the husband, and cannot affect any part of the estate so as to take it from the husband's creditor's (*u*). In ascertaining the value of the husband's property for the purpose of settling the amount to be paid to the wife, the Court would, of course, take into consideration the whole state of his affairs and the amount of his debts. If then no order for alimony could be made which would defeat the husband's creditors, it follows that no compromise of a claim for such

Not good against creditors.

(*q*) 45 & 46 Vict. c. 75, s. 1 (3), (4).

(*r*) 45 & 46 Vict. c. 75, s. 1 (2), (3); *In re Shakespear*, 30 Ch. D. 169; ante, p. 282.

(*s*) 4 D. F. & J. 221.

(*t*) *Williams* v. *Bailey*, L. R. 2 Eq. 735; *Gibbs* v. *Harding*, L. R. 5 Ch. 338; and see Eversley. Dom. Rel. 467, 468 et seq.

(*u*) *Fitzer* v. *Fitzer*, 2 Atk. 513; *Barnardiston* v. *Simpson*, MS. 1726, Appendix No. VII.

alimony could be of itself a valuable consideration binding against existing creditors. A careful examination of all the cases seems to warrant the conclusion that it is the compromise of the suit itself, or the right to institute it, whereby the debtor is relieved, not only from the costs, but also from the trouble and scandal attending such a suit, which is the real consideration; as shewing that the provisions of the deed were not the spontaneous act of the husband for his own benefit, but such as he would have been likely to accept, even though unwilling to make any arrangement for the maintenance of his wife (*v*).

But the compromise is the real consideration.

It is an undecided point whether merely reciprocal covenants by husband and wife with each other not to sue for the restitution of conjugal rights would now be deemed a valuable consideration. It is submitted that, having regard to *Besant* v. *Wood* (*w*) and to the Married Women's Property Act, 1882 (*x*), such reciprocal covenants would now be held to support a deed against creditors or purchasers.

Reciprocal covenants.

It may be noticed here that it has been decided that an agreement by a wife to waive the further prosecution of an indictment *against her husband [* 311] for an assault in consideration of his allowing her an annuity by way of separate maintenance, is an illegal contract, although entered into with the sanction of the Court in which the indictment was tried, and that the wife cannot even come in with other creditors of her husband for arrears of the annuity (*y*). But in this case the earlier one of *Elworthy* v. *Bird* (*z*) does not appear to have been cited. There too an indictment for assault was compromised with the sanction of the Court in which the indictment was tried; but this was not allowed to make the separation deed founded on the compromise illegal. It was argued for the deed that if founded on the compromise of a felony or any public misdemeanour it would be void, but not so in respect to the compromise of a private wrong (*a*); and Sir J.

Compromises of indictments when valid.

(*v*) But see *Hobbs* v. *Hull*, 1 Cox, 445; *Nunn* v. *Wilsmore*, 8 T. R. 521; Eversley, Dom. Rel. 479.

(*w*) 12 Ch. D. 655; and see *Marshall* v. *Marshall*, 5 P. D. 19.

(*x*) 45 & 46 Vict. c. 75, s. 1 (2); and see Lush, H. & W. 391 et seq.; Eversley, Dom. Rel. 469, 470.

(*y*) *Garth* v. *Earnshaw*, Y. & C. 584.

(*z*) 2 Sim. & S. 372.

(*a*) This distinction was allowed by L. C. Talbot in *Johnson* v. *Ogilby*, 3 P. Wms. 279.

Leach said, "All the authorities concur that the policy of the law does permit the compromise of assaults."

And Lord St. Leonards, when Lord Chancellor of Ireland, said (*b*) that as to the law with respect to compromises, the authorities seem to admit of a distinction; an agreement in consideration of compounding a prosecution for a felony is void, but an agreement to make the prosecutor of a misdemeanour, of a private nature and occasioning a private injury, a reasonable satisfaction in consideration of proceedings stayed, may not be illegal. In *Coppock* v. *Bower* (*c*) the offence, though not a felony, was a misdemeanor of a public nature; but in every case in which a man has a private personal interest he has a right, if he pleases, to forbear from a prosecution.

Personal interests may be compromised.

Where a person has a civil and a criminal remedy, he may compromise.

Where the offence is such that the person injured has the choice between a civil and a criminal remedy; it is not against the policy of the law for the injured person to enter into a compromise with regard to the civil proceedings (*d*).

Collusion between husband and wife.

[* 312]

It may be said that if a deed of separation contain- ing a * covenant of indemnity, or any of the other ingredients above mentioned, is good against creditors, it offers a debtor an easy opportunity of evading the statute and defrauding his creditors; but it must be remembered that, although the value of the consideration will not be nicely scrutinized, the question of bona fides or not will be carefully examined, and a husband and wife will "not be permitted by colluding together to disappoint the security of fair creditors" (*e*).

A separation deed executed in consideration of a separation which never took place cannot, after the death of the husband or wife, be supported as a voluntary settlement (*f*).

Contracts entered into with respect to and provisions

(*b*) In *Westby* v. *Westby*, 2 D. & War. 519; *Keir* v. *Leeman*, 13 L. J. Q. B. 359. See *Williams* v. *Bayley*, L. R. 1 H. L. 210, *Flower* v. *Sadler*, 10 Q. B. D. 572.

(*c*) 4 M. & W. 361.

(*d*) *Fisher* v. *Apollinaris Co.*, L. R. 10 Ch. 297.

(*e*) *Fitzer* v. *Fitzer*, 2 Atk. 511, as explained by the M.R. in *Hobbs* v. *Hull* 1 Cox, 446.

(*f*) *Bindley* v. *Mullonev*, L. R. 7 Eq. 343.

for prospective separation are not only voluntary but illegal and void, whether the deed be post-nuptial or ante-nuptial (*g*). Even when not open to this objection, separation between husband and wife is not of itself a valuable consideration (*h*); but the trusts of a separation deed actually executed will be carried out, although there is no consideration for the deed (*i*), unless it be illegal or contrary to public policy (*k*). Agreements for future separation.

It is clear that a separation deed between an unmarried man and a woman with whom he has been cohabiting is per se voluntary (*l*), In *Ex parte Naden* (*m*) a man separated from a woman with whom he had gone through the ceremony of marriage, and executed a separation deed in the usual form, covenanting with the trustees of the deed to pay her an annuity for their joint lives, with a proviso that, if they should live together again by mutual consent, the deed should be void. The annuity was paid till the * man [* 313] became bankrupt. It was held that the proviso was wholly void , and that the deed must be read as if the proviso did not form a part of it. So read, it was a simple voluntary deed of covenant to pay an annuity to a person for life. Separation from a mistress.

To such a settlement as that, however, other circumstances may lend a valuable consideration. So where the woman asserted, and appeared to have a fair prospect of substantiating, a promise of marriage made to her by a man, an annuity given her by him on discontinuance of cohabitation was upheld as on valuable consideration (*n*).

The execution by a husband of a deed of separation already drawn up by agreement may be a legal consideration for a promise by a third person to pay certain Execution of deed as agreed.

(*g*) *Westmeath* v. *Westmeath*, 1 Dow & C. 529; *Bindley* v. *Mulloney*, L. R. 7 Eq. 343; *Byrne* v. *Carew*, 13 Ir. Eq. Rep. 1–6; *H.* v. *W.*, 3 K. & J 382, *Procter* v. *Robinson*, 15 L. T. (N.S.) 431.

(*h*) *Marshall* v. *Rutton*, 8 T. R. 545; *Legard* v. *Johnson*, 3 Ves. 352; *St. John* v. *St. John*, 11 Ves. 526; *Durand* v. *Durand*, 2 Cox, 207; *Logan* v *Birkett*, 1 My. & K. 225; ante, p. 301.

(*i*) *Frampton* v. *Frampton*, 4 Beav. 287.

(*k*) *Hamilton* v. *Hector*, L. R. 13 Eq. 511, S. C. L. R. 6 Ch. 701.

(*l*) *Turner* v. *Vaughan*, 2 Wils. 339 ; *Binnington* v. *Wallis*, 4 B. & Ald. 650; *Clay* v. *Rooke*, Ca. t. Talb. (Forr.) 153, and cases there. A deed founded on the consideration of continuing cohabitation is void : *Lady Cox's Case*, 3 P. W. 338.

(*m*) L. R. 9 Ch. 670.

(*n*) *Keenan* v. *Handley*, 2 D. J. & S. 283.

debts and expenses for which the husband was solely liable (*o*).

Subsequent cohabitation in general avoids separation deed.

It is a general principle that subsequent cohabitation and reconciliation of husband and wife put an end to all the effects of separation; and, therefore, an agreement made on separation, in general, comes to an end when that separation ends (*p*). Even a verbal agreement to reside together in the same house, and not to cohabit as man and wife, has been held to have the same effect (*q*). But the question, whether a particular deed is not merely a separation deed, but is a post-nuptial settlement, depends upon the true construction of the particular instrument; for it is plain that the parties to a separation deed may agree that it shall continue to operate whether there be a return to cohabitation or not (*r*). So an agreement on re-cohabitation to continue a provision for the wife which was expressed to be given, not during separation only, but for her life, [* 314] has been held valid (*s*); *and where the separation deed provided that if the husband and wife should thereafter agree to live together again such cohabitation should in no way alter the trusts thereby created, their subsequent reconciliation for a time was held not to avoid the deed (*t*).

Enforced by injunction.

A covenant to live apart, not now being contrary to the policy of the common law, to which at the Reformation the Ecclesiastical Courts became subordinate, may be enforced by injunction against proceedings for restitution of conjugal rights (*u*).

(*o*) *Jones* v. *Waite*, 5 Bing. N. C. 341.

(*p*) *Bateman* v. *Countess of Ross*, 1 Dow, per Lord Eldon, 245; *Nicol* v. *Nicol*, 30 Ch. D. 143, S. C. 31 Ch. D. per Cotton, L.J., 526; *Westmeath* v. *Salisbury*, 5 Bli. (N.S.) 339, 367; *Hindley* v. *Westmeath*, 6 B. & C. 200; *Fletcher* v. *Fletcher*, 2 Cox, 99; Rop. Husb. & W. vol. 2, 273 n.; *Ruffles* v. *Alston*, L. R. 19 Eq. 545; but see *Barnardiston* v. *Simpson*, post, Appendix No. VII.

(*q*) *Westmeath* v. *Westmeath*, 5 Bli. (N.S.) 339, 367.

(*r*) *Negus* v. *Forster*, 30 W. R. 671; *Nicol* v. *Nicol*, 30 Ch. D. 143, S. C. 31 Ch. D. 524.

(*s*) *Webster* v. *Webster*, 1 Sm. & Giff. 489, S. C. 4 De G. M. & G. 437, commented on in *Nicol* v. *Nicol*, 30 Ch. D., per North, J., 148.

(*t*) *Wilson* v. *Mushett*, 3 B. & Ad. 743; see *Nicol* v. *Nicol*, 30 Ch. D., per North, J., 148, 149.

(*u*) *Hunt* v. *Hunt*, 4 D. F. & J. 221, 227; *Besant* v. *Wood*, 12 Ch. D. 605, and see *Cahill* v. *Cahill*, 8 App. Cas. 421, per Lord Selborne, L.C.

VOLUNTARY CONVEYANCES MADE GOOD BY CONSIDERATIONS ARISING SUBSEQUENTLY.

Voluntary deed made good by matter ex post facto.

A DEED voluntary at the time of its execution may afterwards become valuable by subsequent acts which by matter ex post facto will sometimes make good a settlement which in its creation was not good (*v*).

But, of course, there is no question of so making valid a deed against either creditors or purchasers unless the act relied on to give the deed validity is done without notice of or privity in the fraud of the particular voluntary deed which the act is to be taken to confirm.

It was said by Lord Eldon, in *Johnson* v. *Legard* (*w*), "It cannot be denied with respect to persons who make voluntary settlements, and those who are called volunteers, that they may come to such future bargains as to make that which was originally voluntary no longer to be so considered." This is one reason why the Court will not at the instance of the vendor enforce the performance of a contract to sell land previously voluntarily settled by him (*x*).

(*v*) *Price* v. *Sands*, Gouldsb. 118; *Prodgers* v. *Langham*, Sid. 133; Gilb. Lex P. 286; *Smartle* v. *Williams*, 3 Lev. 387, cited as *Andrew Newport's Case*, Skin. 423, Bacon Abr. tit. Fraud; *Kirk* v. *Clark*, Prec. Ch. 275, Gilb. Lex P. 251, S. C. as *Heisier* v. *Clarke*, 2 Eq. Ca. Ab. 46; *Lady Burg's Case*, F. Mo. 602; *East India Co.* v. *Clavel*, Gilb. Eq. R. 37 Prec. Ch. 377; *Porter* v. *Clinton*, Comb. 222; *Tanner* v. *Byne*, 1 Sim. 166; *Tarleton* v. *Liddell*, 17 Q. B. 390, 421; *Doe* v. *Routledge*, Cowp. 705; *Knatchbull* v. *Kissane*, 5 Dow, 389, 411; *Hart* v. *Middlehurst*, 3 Atk. 377; *Daubeny* v. *Cockburn*, 1 Mer. 638; *Parr* v. *Eliason*, 1 East, 92, 95; *Meggison* v. *Foster*, 2 Y. & C. Ch. 336; *Martyn* v. *McNamara*, 4 Dru. & War. 411, 429; *Clarke* v. *Willott*, L. R. 7 Ex. 313. See also *White* v. *Garden*, 10 C. B. 919; and the comments thereon in *Billiter* v. *Young*, 6 E. & B. 25; and *Earl of Aldborough* v. *Trye*, 7 Cl. & F. 436, 463; *Judd* v. *Green*, 45 L. J. (N.S.) Ch. 111.

(*w*) T. & R. 294.

(*x*) *Peters* v. *Nicolls*, L. R. 11 Eq. 391; *Clarke* v. *Willott*, L. R. 7 Ex. 317; Fry, Sp. Pf. 2nd ed. ss. 387, 870; and see *In re Marsh and Earl Granville*, 24 Ch. D. 11.

Prodgers v. *Langham.*

[* 316] *The general doctrine was laid down in the leading case of *Prodgers* v. *Langham* (*y*), decided under 27 Eliz. c. 4, which Lord Eldon said had long been considered good law (*z*).

It was there agreed *per Curiam* that a deed although void in its creation, and voidable by a purchaser, can become good by a matter ex post facto; as, if one make a feoffment by covin and the feoffee makes a feoffment for valuable consideration, and then the first feoffor enters and makes a feoffment for valuable consideration, the feoffee of the first feoffee shall hold the land, and not the feoffee of the first feoffor. For, although the estate of the first feoffee was in its creation covinous and therefore *voidable*, yet when he enfeoffs one on valuable consideration it shall be preferred before the last (*a*).

Clarke v. *Willott.*

This case has been followed with approval in the case of *Clarke* v. *Willott* (*b*), decided under 27 Eliz. c. 4, where Cleasby, B., said: "It must be borne in mind that a conveyance, though voluntary upon the face of it, and at first void as against a purchaser for consideration, may yet become valid by force of subsequent events. This was held in *Prodgers* v. *Langham* (*c*), a case which Lord Eldon said in *George* v. *Milbanke* (*d*) had long been considered good law, and Lord Kenyon spoke of it in *Parr* v. *Eliason* (*e*) as a leading authority; see also per Lord Eldon in *Johnson* v. *Legard*" (*f*).

The principle and the reason of it.

The principle to be deduced from these cases seems to be this:

When a person has bonâ fide, on the faith of a voluntary gift, contracted a marriage, paid purchase-money, or made an advance, the title of that person, although derived from and passing through a voluntary deed, is to be preferred to the claims of creditors of, or subsequent purchasers from, the original donor.

(*y*) 1 Sid. 133.
(*z*) In *George* v. *Milbanke*, 9 Ves. 193; and Lord Kenyon, in *Parr* v. *Eliason*, 1 East, 92, called it "a very leading authority"; *Clarke* v. *Willott*, L. R. 7 Ex. 317.
(*a*) See also *Roddy* v. *Williams*, 3 J. & Lat. 1.
(*b*) L. R. 7 Ex. 317.
(*c*) 1 Sid. 133.
(*d*) 9 Ves. 190.
(*e*) 1 East, 92.
(*f*) T. & R. 294.

As to mere voluntary conveyances, the reason of this appears to be, that a voluntary deed is always good between the *parties (*g*), and is liable to [* 317] become void only by being actually brought into antagonism with the claims of creditors or subsequent purchasers, and then only so far as it interferes with their rights (*h*).

Voluntary deed really only voidable.

A voluntary deed, therefore, until steps have been taken to impeach it by creditors or purchasers, is not void, but voidable. A deed which is voidable can be affected by subsequent acts in one of two ways; either to be confirmed, and so made no longer voidable, or, on the other hand, to be made actually void. So a bonâ fide sale, &c., for value, before any proceedings have been taken to set it aside, acts as a confirmation of the voluntary estate, which before was voidable, by supplying the only thing which, in the creation, was wanting—viz., a valuable consideration; and a valuable consideration given for a title good against all the world, except certain persons, and only voidable by them on account of the want of consideration (*i*).

Consideration relates back.

In such a case the person who pays a consideration to the voluntary grantee may constructively be held to be in the same situation as if he or she had, in the first instance, paid it to the original donor (*k*); the consideration is made to relate back to the first instrument. An illustration of this may be drawn from the case of *Low* v. *M'Gill* (*l*), in which Mrs. I. was living in the same house with T., and was the owner of certain goods therein, which goods she, for a fraudulent purpose, permitted T. to assign, as if they had been his own, by a bill of sale in his own name as security for money advanced. It was held that the goods were well vested in the assignee by the bill of sale, and that it was valid against a subsequent execution. This was, in effect, a fraudulent gift by Mrs. I. made good pro tanto by a subsequent bonâ fide charge.

(*g*) Per Anderson, J., in *Upton* v. *Basset*, Cro. Eliz. 445, post, pt. v. ch. iv.

(*h*) Ante, pp. 68, 208; post, p. 325; pt. vi. ch. i.

(*i*) See *Daubeny* v. *Cockburn*, 1 Mer. 626, 638. Payment of a valuable consideration by a person not having the legal estate, and not being an object of the power, cannot set up an invalid appointment in favour of such purchaser. Sug. Pow. 8th ed. 542, 616–7; Farwell, 349.

(*k*) Per Sir W. Grant, 1 Mer. 638; *Morewood* v. *South Yorks, &c., Co.*, 3 H. & N. 798.

(*l*) 12 W. R. 826.

Where voluntary conveyance induced marriage.

This principle has often been applied in cases where [* 318] a voluntary * conveyance has supplied the sole or the principal inducement for a marriage.

To uphold such conveyance by the ex post facto consideration of marriage against creditors or subsequent purchasers, it is not necessary to shew by direct or positive proof that such conveyance did actually form an inducement to the marriage (*m*).

Must voluntary conveyance be *sole* inducement?

It has been a doubtful question whether the voluntary conveyance must be the *sole* inducement on the faith of which the marriage takes place. It is conceived that the result of the cases goes to shew that such conveyance will be supported if it be proved to be the *principal* inducement to such marriage.

A certain relationship must, however, be established between the voidable act and that by which it is to be made valuable. Thus, if a man seised in fee make a voluntary deed settling his estate upon himself for life, with remainder to his first and other sons in tail, though he afterwards marries and has a son he may subsequently sell and convey the lands to a bonâ fide purchaser, as to whom, by all the authorities, the settlement will be void within the statute 27 Eliz. c. 4 (*n*), if and because there was nothing to shew that the marriage was induced by the settlement.

Prodgers v. *Langham.*

In the early case of *Prodgers* v. *Langham*, (*o*) the value of marriage to give ex post facto validity to a voluntary settlement was laid down by the Court. In that case B. made a lease of lands to trustees, in trust for his unmarried daughter for her maintenance before marriage, and if she married P., or any one of whom B. approved, then in trust for her for the residue of the term. The daughter married a man whom B., her father, did *not* like, but afterwards he "was content" and went and lived with them.

It was held by the Court that the conveyance to the daughter before marriage was a voluntary conveyance void against purchasers ; but that, although it was void in its creation as to purchasers, yet, when the marriage

(*m*) *Guardian Assurance Co.* v. *Viscount Avonmore*, L. R. 6 Ir. Eq. 396 ; infra, p. 320.

(*n*) Per Lord Campbell in *Turleton* v. *Liddell*, 17 Q. B. 421.

(*o*) 1 Sid. 133, decided under 27 Eliz. c. 4.

took effect, "the first * settlement no longer [* 319] remains voluntary as it was in its creation, but is on valuable consideration, inasmuch as the marriage is an advancement to the daughter, and he who married her was induced to do so by reason of that provision."

In *Kirk* v. *Clark* (*p*) a father was tenant for life of copyhold lands, with remainder to his wife for life, the reversion to himself in fee; and, merely to lessen the fine in case of the copyhold descending on his son, he made a surrender of the reversion to his eldest son in tail remainder to his own right heirs. The son afterwards married, and evidence was adduced, to shew that this estate in reversion of the son in the copyhold was what chiefly induced the friends of the lady to consent to the match, although other land was also settled on the son on the marriage; and the Lord Chancellor Lord Cooper "decreed the surrender to the son good against the purchaser; and though it were at first voluntary, yet upon his treaty of marriage, being regarded as the *principal inducement* thereto, it now became valuable" (*q*). *Kirk* v. *Clark*.

In the *East India Company* v. *Clark* (*r*) decided under Eliz. c. 5, it was said that if the settlement were voluntary in its creation, yet, being the motive and inducement to J. S. to marry her, it had now become valuable (*r*).

In *Brown* v. *Carter* (*s*) Sir R. P. Arden said that *Prodgers* v. *Langham* (*t*) had been relied on to shew that circumstances ex post facto may make good a settlement that might have been impeached; that the meaning of it is that, though the estate does not appear to have been settled on the marriage, it may be intended to be an inducement to consent to the marriage; and then the father shall not afterwards set up a subsequent conveyance for valuable consideration to put an end to that conveyance upon the faith of which that marriage was contracted. In the course of his judgment he said: "It does not appear that it was regarded as the princi- *Brown* v. *Carter*.

(*p*) Prec. Ch. 275, decided under 27 Eliz. c. 4, S. C. as *Heisier* v. *Clarke*, 2 Eq. Ca. Ab. 46.

(*q*) But see Sir R. P. Arden's comments in *Brown* v. *Carter*, 5 Ves. 878.

(*r*) Prec. Ch. 377, Gibb. Eq. Rep. 37, commented on by Lord Eldon in *George* v. *Milbanke*, 9 Ves. 193; and see *Payne* v. *Mortimer*, 4 D. G. & J. 447.

(*s*) 5 Ves. 877, decided under 27 Eliz. c. 4.

(*t*) 1 Sid. 133.

[* 320] pal inducement; but it might *be so. The lady had a right, the children have a right, to have it considered that he had the estate which he appeared to have; and I should do gross injustice in taking away that benefit."

In the recent case of *Guardian Assurance Company* v. *Viscount Avonmore* (*u*) in Ireland, this question was carefully considered.

The question in that case was whether a deed voluntary in its inception became a deed for value ex post facto by the marriage of the parties. It was held to have become by the marriage a deed for value. The true rule was there laid down to be that if the Court upon consideration of all the facts comes to the conclusion that the marriage took place on the faith or in the belief of the voluntary deed affording a provision in whole or in part for the parents or their children, then the marriage does supply a consideration for the settlement, and makes it a deed for value.

Is presumption of inducement necessary?

It has also been a doubtful question whether there is or is not in such cases a presumption that, in the absence of evidence to the contrary, the settlement was an inducement to the marriage. It is conceived that the true view now is that there is no such presumption.

In the early cases such a presumption, it was held, must be made. So in *Brown* v. *Carter* (*v*) Sir R. P. Arden said: "Therefore I am of opinion, though it does not appear the wife's friends did speculate upon this and take it into consideration, it must be presumed they did act upon it." (*v*).

This case was followed in *Roddy* v. *Williams* (*w*) with approval; and Lord St. Leonards seems to have upheld this view (*x*).

In *Tarleton* v. *Liddell* (*y*), however, Lord Campbell seems to have expressed a contrary opinion.

The case of *Brown* v. *Carter* (*v*), moreover, as was

(*u*) L. R. Ir. 6 Eq. 391.
(*v*) 5 Ves. 877.
(*w*) 3 J. & L. 17.
(*x*) Sug. V. & P. 14th ed. 720.
(*y*) 17 Q. B. 421; and see *George* v. *Milbanke*, 9 Ves. 193.

explained * by Lord Romilly in *Hoghton* v. [*321] *Hoghton* (*z*) does not establish the proposition that, in the absence of evidence to the contrary, it is to be taken for granted that the settlement was an inducement to the marriage. The voluntary settlement in *Brown* v. *Carter* (*a*) was made in 1768; the limitations of it gave interests to any children the settlor might have, with remainders over. In 1779 he married. In 1799 he conveyed the estate to the plaintiffs, who filed their bill to set aside the settlement of 1768. The decision, therefore, as is clear from the concluding words of the judgment, only shews that, after a lapse of twenty years and loss of evidence, everything shall be presumed against the person who has delayed to bring the question before the Court for that period of time.

In the recent case in Ireland of *Guardian Assurance Company* v. *Viscount Avonmore* (*b*), in which Lord Romilly's remarks in *Hoghton* v. *Hoghton* (*z*) were cited with approval, it was laid down that "there is no presumption, in the absence of any evidence, that the parties knew of and acted on the deed. It is a question of fact, and, in the absence of proof, the Court must infer it from the circumstances of the case."

The principle, so far as the consideration of marriage is concerned, seems to approach very closely, to that by which the Court was actuated in those cases which have decided that if a parent or his agent or a stranger (*c*) holds out inducements to another to celebrate a marriage, and holds them out deliberately and plainly, and the party consents and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out to him, the Court will take care that he is not disappointed, and will give effect to the proposal (*d*).

Same principle applies to subsequent sale or mortgage.

The same principle has been frequently applied to make a settlement originally voluntary good by a subsequent sale, or mortgage, or other valuable consideration, against *purchasers*.

(*z*) 15 Beav. 278, 316.
(*a*) 5 Ves. 877.
(*b*) L. R. 6 Ir. Eq. 397.
(*c*) *Crofton* v. *Ormsby*, 2 Sch. & Lef. 583.
(*d*) Per Lord Lyndhurst in *Hammersley* v. *De Biel*, 12 Cl. & F. 78, 79. See also *Maunsell* v. *White*, 4 H. L. C. 1039; post, pt. iv. ch. v.

Subsequent sale.

[*322] *"There is no difference," said Lord Eldon in *George* v. *Milbanke* (*e*), "between a voluntary settlement made good by a subsequent marriage, and one made good by a subsequent advance of money;" and "the substantial justice of this case is very much the same where an instrument of this kind is carried to a man who, upon the authority of it, advances money, and where he advances money at the time" the voluntary conveyance was made. The consideration paid by the second grantee relates back so as to confirm his title, although it passes through a voluntary instrument which thus becomes an authentic channel through which the title may be conveyed; and the acts by which the conveyance is made valid must be completed before any steps are taken to set it aside; for the voluntary deed, as soon as it becomes opposed to the creditors of or purchasers from the author of it, becomes no longer only voidable, but, as to them, void (*f*).

Feoffments to escape wardship.

This doctrine is as old as the statute of Marlebridge, 52 Hen. 3, c. 6, which was intended to make void feoffments by tenants to their heirs, when under age, of their heritage, to defraud the lords of the fee of their wardships; on which it was held that feoffees of the feoffees upon the same collusion were within the statute, "but if the feoffees in the life of the ancestor make a feoffment in fee bonâ fide and then the tenant dieth, his heir within age, the lord shall not have any action upon this statute, for that the collusion continued not until the death of the tenant; but if the tenant had died, his heir within age, and *then* the feoffees had enfeoffed others bonâ fide, yet the lord shall recover the wardship, because the lord, *by the death of his tenant*, was once entitled to his action" (*g*).

Consideration when grantee has altered his position on faith of gift or settlement.

A consideration ex post facto may also be supplied in any case, as against a subsequent *purchaser*, where the donor of a voluntary gift or the settlor of a voluntary settlement has, after that gift or settlement, permitted the donee or the grantee to materially alter his position in consequence of such gift or settlement.

In *Dillwyn* v. *Llewellyn* (*h*) a father by a written

(*e*) 9 Ves. 195; and see *Myers* v. *Duke of Leinster*, 7 Ir. Eq. Rep. 146, 166; ante, p. 184.
(*f*) See also *O'Connor* v. *Bernard*, 2 Jones (Ir. Rep.) 654.
(*g*) 2 Co. Inst. 111–7.
(*h*) 4 De G. F. & J. 517.

memorandum *signed by him gave his son land [*323] for the purpose of building a house there as a residence, and at the same time put him in possession of it. The son built a house at an expense of £14,000, with the knowledge and approval of his father, and lived there to his father's death. The father by his will devised the property to his wife for life, with remainder to his son for life, with remainder to his first and other sons.

Lord Westbury, L.C., held that the subsequent expenditure by the son on the faith of the memorandum, with the approval of the father, supplied a voluntary consideration originally wanting, and creating a binding obligation; and declared the son the owner in fee of the estate comprised in the memorandum. The principle upon which this ex post facto consideration in such a case is founded seems to be that the voluntary settlement is really the consideration, as it were, moving to the voluntary grantee for the action he takes upon the faith of it (*i*).

Doctrine applies in favour of *purchasers*.

The doctrine of allowing subsequent valuable consideration to set up a voluntary deed is well within the principle of decision on the statute 27 Eliz. c. 4.

Does deed become good against *creditors* by valuable consideration ex post facto from grantee?

There seems to be some difficulty, however, in the application of this principle to cases where the rights of *creditors* are concerned under 13 Eliz. c. 5; and where the question is whether the settlement originally voluntary has been made valuable by a subsequent *money* payment or other valuable consideration (except marriage) moving from the grantee.

This point does not appear to have ever been expressly decided. The question only arises in cases where the voluntary grantee has not divested himself of the property conveyed to him by the grantor, by a transfer for value to a bonâ fide purchaser without notice of fraud. Of course the question would not arise if there was evidence of fraud sufficient to avoid the deed against creditors, independently of the want of consideration.

It must be borne in mind that the object of these two statutes of Elizabeth is totally different. The statute 13 Eliz. c. 5, protects "creditors and others" against

(*i*) See *In re Barker's Estate*, 44 L. J. (N.S.) Ch. 490, per Jessel, M.R., decided on 27 Eliz. c. 4; ante, p. 280.

[* 324] what was then a fraud at common * law (*k*); but the statute 27 Eliz. c. 4, merely protects a purchaser against a prior voluntary settlement of the same property; and, as it were, creates a statutory fraud, which may be no real fraud at all.

Time at which rights of creditors and purchasers arise.

There is also a difference of some consequence as to the *time* at which the rights of creditors and those of purchasers arise.

The rights of creditors in general (*l*) to avoid a voluntary settlement of real or personal estate made by the settlor accrue immediately on the execution of that settlement. The question, whether it is or is not void against them, depends on all the circumstances at the time it was executed.

In point of time, therefore, their right to avoid the settlement is prior to the ex post facto consideration which is to support the settlement against them in favour of the voluntary grantee.

The right of a purchaser, however, to avoid a voluntary settlement of real estate made by the settlor accrues of course only at the date of his purchase. Till there is a bonâ fide purchaser in existence, the voluntary grantee can by a valuable ex post facto consideration make his title unimpeachable.

It is conceived, however, that the true view is that this principle does apply to cases under 13 Eliz. c. 5. It would seem that there may just as well be valuable consideration ex post facto (other than that of marriage) when the voluntary grantee takes action on the faith of the voluntary settlement made in his favour by the grantor, under the one statute as under the other; the voluntary settlement is in each case the real consideration, as it were, which moves to the voluntary grantee. There also does not appear to be any real difference in this respect between a conveyance to defraud a *subsequent* creditor and a conveyance to defraud a subsequent purchaser.

Although the cases of *Dillwyn* v. *Llewellyn* (*m*) and *In re Barker's Estate* (*n*) were decided with reference

(*k*) Ante, pp. 3, 5, 193; see *Battersbee* v. *Farrington*, 1 Sw. 113.
(*l*) Ante, pp. 13–15, 35, 67.
(*m*) 4 De G. F. & J. 517; ante, p. 322.
(*n*) 44 L. J. (N.S.) Ch. 487; ante, p. 280.

to 27 Eliz. c. 4, the principles there laid down by Lord Westbury, L.C., and Sir G. Jessel, M.R., seem to apply to similar cases under 13 Eliz. c. 5.

In considering this question, it is of great [325] importance to keep carefully in view the true nature of the rights of "creditors and others" under 13 Eliz. c. 5, and of subsequent purchasers under 27 Eliz. c. 4.

Conveyances under both statutes voidable only; and only as against creditors or purchasers.

A deed which, by virtue of the statute 13 Eliz. c. 5, is "utterly void" *only* as to "creditors and others" so soon as it is executed, is nevertheless a perfectly good deed as between the parties, and as against all persons who claim through the settlor (*o*). It is therefore in reality a deed which is voidable only, and not void (*p*). Till made void by "creditors and others," it is a valid deed, and one by virtue of which the legal estate vests in the voluntary grantee, subject to its being divested.

So a deed which is fraudulent under 27 Eliz. c. 4, is only voidable, and not void; and, till avoided by a sale to a bonâ fide purchaser, is a perfectly good deed as against all the world. Although the fraudulent conveyance is said to be "utterly void," against the parties aggrieved, in both statutes, it is not to be implied that it was an absolute nullity when originally executed.

How right to avoid conveyance may be lost.

The right of the person defrauded under these statutes to elect to avoid (*q*) a deed as fraudulent may be lost in either of the following ways:—

First, it may be lost by the deed having become for value by a consideration ex post facto before any steps are taken by that person to impeach it (*r*).

Secondly, the voluntary grantee may have divested himself of the property by a bonâ fide transfer of it for value to a bonâ fide purchaser for value without notice of fraud (*r*).

Such a purchaser from the voluntary grantee acquires under these statutes (*s*) an unimpeachable title,

(*o*) Ante, pp. 316, 317; post, pt. v. ch. iv.

(*p*) Bac. Abr. tit. Void and Voidable; Bump. Fr. Conv. (Amer.), 2nd ed. 481–482; and see *Stevenson* v. *Newnham*, 15 C. B. 303, per Parke, B.

(*q*) *Morewood* v. *South Yorkshire Co.*, 3 H. & W. 798, 801.

(*r*) Ante, pp. 315 et seq.

(*s*) 13 Eliz. c. 5, s. 6; 27 Eliz. c. 4, s. 4; ante, pp. 80, 81, 83,

which cannot be avoided either by "creditors and others," or by a purchaser.

[* 326] *The words of the sections which protect such purchaser "for good consideration and *bonâ fide*" and without notice of fraud are nearly the same in both statutes (*t*). It will be noticed that the scope of both of the sections is very broad; they are not limited in terms to a conveyance from the grantor, but apply to any conveyance *either* from the fraudulent grantor or grantee. The sections do not specify the person by whom the conveyance is to be made, and it is conceived that, as corresponding sections of these two statutes, they would receive the same construction.

Same construction in America.

This is, moreover, the settled construction which these sections have received in America, where it has been held that a bonâ fide, innocent purchaser for value from *either* a fraudulent grantor or a fraudulent grantee acquires an indefeasible title (*u*).

When does deed become valid owing to ex post facto consideration?

When a voluntary deed is made a deed for value by matter ex post facto, a question arises, from, what period is that deed to be deemed a deed for value?

It has been held in *O'Donovan* v. *Rogers* (*v*), that such consideration does *not* relate back to the time of execution of the original deed so as to defeat an intermediate deed for value; but that the deed became valid as against a creditor or purchaser from the date of such matter and no sooner.

Between two voluntary conveyances of same property, priority of date confers title.

As between two voluntary conveyances, that which is prior in time will prevail, if bonâ fide (*w*). The ground of this is that although such conveyance is bad as against a creditor or a subsequent purchaser, it is good as between the parties to it (*x*); and therefore the first voluntary grantee holds the property against a subse-

188; Story, Eq. Jur. 12th ed. ss. 434–436; Bump. Fr. Conv. (Amer.), 2nd ed. 436, 451, 480, 481; and see the judgments in *Anderson* v. *Roberts*, 18 Johns. 513 (Amer.).

(*t*) 13 Eliz. c. 5, s. 6; 27 Eliz. c. 4, s. 4.

(*u*) Bump. Fr. Conv. (Amer.), 2nd ed. 480–482; *Anderson* v. *Roberts*, 18 Johns. 513.

(*v*) 7 Ir. Ch. Rep. 1, 496; post, p. 328; and see *Stevenson* v. *Newnham*, 15 C. B. 297.

(*w*) *Clavering* v. *Clavering*, 2 Vern. 473; *George* v. *Milbanke*, 9 Ves. 195; *Doe* v. *Rusham*, 17 Q. B. 733; Story, Eq. Jur. 12th ed. s. 433; ante, pp. 221, 222.

(*x*) Ante, p. 325; Story, Eq. Jur. 12th ed. s. 425.

quent grantee from the same grantor, who had no estate left in him to convey to that second voluntary grantee (*y*). It is only by virtue of the statutes that the voluntary *conveyance is liable to be [*327] made void as against creditors, or to be defeated by a conveyance to a subsequent purchaser (*z*).

This principle, that, as between voluntary conveyances of the same property from the same grantor, priority of date confers the title to the property, applies to the following two questions:—

Rights of two subsequent purchasers from two voluntary grantees.

The first is, What are the respective rights of two subsequent purchasers for value of the same property from two voluntary grantees holding from the same grantor?

Rights of a subsequent purchaser from a voluntary grantee and another voluntary grantee.

The second is, What are the respective rights of a subsequent purchaser for value of property from a voluntary grantee, and another voluntary grantee of that property holding from the same grantor?

According to the principle laid down in *Doe* v. *Rusham* (*a*), overruling the Irish case of *Moffett* v. *Whittaker* (*b*), when a settlor has parted with his whole estate in favour of a voluntary grantee, it is conceived that, as he has no estate left in him, any subsequent *voluntary* conveyance by him of the same property is a nullity. If this be so, it follows that any dealing with such subsequent voluntary conveyance is also a nullity.

The question, then, in these two cases seems to depend simply on which of the two voluntary settlements was the first in date, assuming, of course, that the two settlements comprise the same property; and therefore a subsequent purchaser from a voluntary grantee cannot defeat a prior voluntary settlement (*c*), or a purchaser from that prior voluntary grantee.

So in an old case where a man seised in fee, having made a voluntary conveyance with power of revocation, afterwards, without effectually exercising that power,

(*y*) *Doe* v. *Rusham*, 17 Q. B. 733.
(*z*) *Dolphin* v. *Aylward*, L. R. 4 H. L. 499; *Rosher* v. *Williams*, L. R. 20 Eq. 218; ante, pp. 68, 208, 325.
(*a*) 17 Q. B. 732, 733.
(*b*) 1 Lang. & Town. 141.
(*c*) Sug. V. & P. 14th ed. 714; and see *In re M'Donaghs' Estate*, 3 L. R. Ir. 408.

made another conveyance to a nephew for his advancement, and the nephew sold to a purchaser for value, it was held that the purchaser could not avoid the first voluntary grant (*d*).

Does purchaser from grantee prevail over subsequent one from grantor?

[* 328] * It has also been questioned whether a purchaser for value from a voluntary grantee can prevail over a subsequent purchaser for value from the original grantor by reason of the title of such first purchaser for value relating back to the time of the original voluntary settlement, so as to prevail over any intermediate purchaser for value.

This was discussed in Ireland under the Act 10 Car. 1, sess. 2, c. 3, which corresponds to 27 Eliz. c. 4, in the case of *O'Donovan* v. *Rogers* (*e*). In that case a father made a voluntary settlement on his daughters. He afterwards mortgaged the same property. On the subsequent marriage of one of the daughters, her share in the property under the voluntary settlement was conveyed to trustees upon the trusts of her marriage settlement; and the share of another daughter was settled for value after the mortgage was executed. It was there laid down, as decided by the old case of *Goodchild* v. *Moses* (*f*), that he whose purchase is prior in time shall prevail; and that the consideration does not relate back to the date of the original voluntary settlement. The ground of this was that it would defeat the whole policy of the Act if a subsequent purchaser could so set up a voluntary settlement which was avoided by the operation of the statute.

The principle of the decision in this case seems really the same as in the other two cases just discussed. The real question seems to be, which of the two purchasers for value was the first in point of time? As against a purchaser, the voluntary settlement is a nullity, so that a purchaser from a volunteer can only defeat a purchaser from the original grantor if his purchase be the first of the two purchases in point of time.

So it would appear that a purchase from a voluntary grantee would not prevail against even a fraudulent

(*d*) *Lady Burg's Case*, F. Moo. 602; and see *Clerk* v. *Rutland*, Lane, 113; *Eden* v. *Chalkhall*, Sir T. Raym. 25; Com. Dig. tit. Covin, B. 4, ult.

(*e*) 7 Ir. Ch. Rep. 1, 496.

(*f*) 2 Sir Wm. Bl. 1019; Rob. Conv. 497.

conveyance which was made previously to the voluntary grant (*g*).

In America the same principle of priority of date applies in each of these three cases. It has long been there regarded as settled law that the *first* purchaser for value, whether he takes *the conveyance [* 329] from the voluntary grantor or from the voluntary grantee, will have the preference. So, too, as between two voluntary grantees, he who has the first conveyance prevails (*h*). Same principles apply in America.

But where (*i*) the second conveyance by the settlor was expressed to be made in consideration of a sum of money (which, however, was never paid), and the grantee under it sold to a purchaser for value without notice that the second conveyance was not a bonâ fide sale, it was decided that the first voluntary settlement was void against a bonâ fide purchaser. Second grant expressed to be for value.

Where the first conveyance by the original settlor is really fraudulent or fraudulently kept on foot (*k*), it seems that a bonâ fide purchaser from his heir or devisee will avoid it (*l*). Fraud, aliter.

It seems that a deed executed by a debtor for the benefit of his creditors, though voluntary and revocable at its execution, because none of the creditors were parties or privies to it, may become valid and valuable by the way in which it is subsequently used as by being communicated to or executed by creditors, and by their having upon the faith of it refrained from enforcing their remedies against the debtor (*m*). Creditors' deeds.

A conveyance which is at the time of its execution supported by an adequate valuable consideration is not liable, under the statute of 27 Eliz. c. 4, to be defeated by a subsequent conveyance for value of the same prop- Failure of consideration by matter ex post facto will not make deed voluntary.

(*g*) *Clerk* v. *Rutland*, Lane, 113; Rob. Conv. 382-3; ante, p. 238.

(*h*) See *Anderson* v. *Roberts*, 18 Johns. (Amer.) 513; Story, Eq. Jur. 12th ed. ss. 434–436.

(*i*) *Doe* v. *Martyr*, 1 Bos. & P. N. R. 332.

(*k*) Sug. V. & P. 14th ed. 713; Dart, V. & P. 5th ed. 902.

(*l*) *Burrell's Case*, 6 Rep. 72 a; *Warburton* v. *Loveland*, 6 Bli. (N.S) 1, 31.

(*m*) *Acton* v. *Woodgate*, 2 My. & K. 492; *Smith* v. *Hurst*, 10 Hare, 30; Dart, V. & P. 5th ed. 901; and see post, p. 393 and pt. v. ch. iv., as to subsequent consideration for voluntary *agreements*.

erty merely because the consideration has, since the execution of the conveyance, failed by matter ex post facto. This principle was laid down in *Paget* v. *Paget* (*n*), decided in Ireland under 10 Car. 1, sess. 2, c. 3, which corresponds to 27 Eliz. c. 4. In that case a deed of indemity, originally for value, was executed by a minor, and was avoided by him after a lapse of ten years on the ground of infancy, though a perfectly honest transaction. It was held that the deed was none [*330] the less *for value because the consideration was made void by matter ex post facto. So far as regarded the consideration necessary to support a transaction, its validity was to be judged of by the state of circumstances at the time when the transaction took place, and not by the events which subsequently occurred (*o*). The imputed fraud under the statute must be presumed to have existed, if at all, at the time at which the conveyance sought to be defeated was executed; and the failure, by matter ex post facto, of what was at the time a sufficient consideration, could not operate so as to create the supposed fraud retrospectively.

(*n*) 9 L. R. Ir. 128, 142; *Tarleton* v. *Liddell*, 7 Q. B. 414, 421.
(*o*) Fry, Sp. Pf. 2nd ed. 196, 197; ante, p. 268.

* CHAPTER IV. [*331]

THE NATURE AND EXTENT OF THE CONSIDERATION OF MARRIAGE.

Marriage is a civil contract.

MARRIAGE has in all ages and countries been regarded, from a legal point of view, more or less as a civil contract, mutually entered into by a man and a woman, according to the solemnities for the time being required by the laws of the country to which they belong (*p*). The religious rites and observances which have generally accompanied the marriage have, even in Christian countries, seldom been necessary to the validity of the nuptials.

Canon law.

The canon law, indeed, from which our own law of marriage is derived, regarded marriage more as an act of religion than of civil contract, but at the present day it may be validly celebrated either with or without any religious formalities. By the English law marriage is regarded merely as a civil contract (*q*).

Law treats it like other contracts.

The law, Blackstone says (*r*), "considers marriage in no other light than as a civil contract . . . and taking it in this light the law treats it as it does all other contracts, allowing it to be good and valid in all cases where the parties at the time of making it were, in the first place, willing to contract; secondly, able to contract; and lastly, actually did contract, in the proper forms and solemnities required by law;" and applies to it, with some exceptions, the ordinary principles which attach to other contracts (*s*).

Nature of the contract.

It is a contract of a peculiar kind, which is entered into "with a view not only to the benefit of the parties themselves, but to the benefit of third parties, to the

(*p*) See Eversley, Dom. Rel. pp. 4 et seq.

(*q*) Shelford, Mar. & D. 17. As to the difference in England before and since the Reformation, see *Hunt* v. *Hunt*, 4 D. F. & J. 221, 227.

(*r*) 1 Bl. Com. 21st ed., 433.

(*s*) 2 Steph. Com. 8th ed., 238; 1 Broom, Com. 523; *Dalrymple* v. *Dalrymple*, 2 Hagg. Con. 54, 62.

benefit of their common offspring, and to the moral order of civil society" (*t*).

It also partakes of the nature of a vow, which, though [* 332] entered into * voluntarily, cannot be dissolved like other contracts by the mutual consent of the parties.

For these reasons, and with the view of enabling persons at this starting-point of a new family to enter into arrangements and settlements of property not to be easily overturned, the law gives to any contracts with regard to property into which the intending husband or wife or their friends on their behalf may enter at the time, the weight and security of a valuable consideration, and makes them binding, not only against the parties themselves, but against all other persons, to the same extent as if the settlement had been a conveyance made in consideration of the full value paid (*u*)

Valuable consideration.

By the civil law.

And the civil law allowed the same privileges to marriage portions as to other alienations on valuable consideration, and supported them in the hands of those who received without notice of the fraud (*v*).

Marriage the highest consideration known to our law.

The consideration of marriage, said Lord Hardwicke, is "the best consideration that can be" (*w*). It is the highest known to the law (*x*), and one which it is the policy of the law to give paramount force to.

Unless the marriage itself be a mere fraudulent contrivance for defeating creditors, the doctrine both at law and in equity has been to support a settlement of the husband's property when it appears to have been made previously to and in consideration of an honest marriage. Such a settlement will be upheld notwithstanding the embarrassed circumstances of the husband at its date, and even where the wife has contracted the marriage and obtained the settlement with a full

(*t*) Shelford, Mar. & D. 3.

(*u*) *Assaby* v. *Manners*, Dyer, 235 a; *Douglasse* v. *Ward*, 1 Ch. Ca. 99; *Wheeler* v. *Caryl*, 1 Amb. 121; *Churchman* v. *Harvey*, ibid. 340; *Partridge* v. *Gopp*, 2 Amb. 596; *Reynell* v. *Peacock*, 2 Ro. 105, 2 Ro. Abr. 34, tit. Fraud; *Raw* v. *Pote*, 2 Vern. 239; *Dilkes* v. *Broadmead*, 2 D. F. & J. 566; *Webber* v. *Farmer*, 4 Bro. P. C. 170.

(*v*) Domat, book 2, tit. 10, sec. 1, par. 11.

(*w*) *Townshend* v. *Windham*, 2 Ves. 4.

(*x*) *Ford* v. *Stuart*, 15 Beav. 495, 499, S. C. reversed on a different point, 4 D. & J. 661.

knowledge of the husband's embarrassments (*y*). So it is only for very gross fraud, as when the marriage itself is a mere fraudulent device to defeat creditors, * that the consideration is not capable of sup- [* 333] porting it (*z*), and will do so in some cases where the consideration of money actually paid would not avail.

Marriage settlement by heir or devisee not liable to ancestor's debts.

Thus, although a debt of an ancestor is binding on his heir or devisee, a settlement by whom will be as much within the statute as if made by the ancestor himself (*a*), yet, in the absence of any special circumstances, land, after alienation by the heir or devisee for the purpose of a marriage settlement, is not liable to the specialty debts of the ancestor of which there is full notice at the time of the settlement (*b*).

In *Richardson* v. *Horton* (*c*) Sir W. Horton, indebted by specialties binding his heirs, died, leaving an only daughter, his heiress-at-law and devisee of his real estate (subject to a life interest), and on her marriage, two years afterwards, a portion of the real estate was conveyed by deed to trustees to be sold to pay the debts, and the remainder of the real estates was limited to the use of the husband and wife and the issue of the marriage. The land so set aside proved insufficient, and the creditors claimed satisfaction out of the settled estates, but it was held that they were not entitled to payment thereout. The settlement, it was said, came within the proviso in favour of conveyances for good consideration and bonâ fide, for it was clearly for valuable consideration (the marriage), and, no mala fides being directly proved or expressly alleged, Lord Langdale, M.R., decided that it could not be inferred from the circumstances. The imputation of fraud merely rested on this—viz., that the parties to the settlement, knowing that there were debts of the testator remaining unpaid, and setting apart only a portion of the estates to provide a fund for the payment of those debts, settled the remainder, providing at the same time that the rents of the estate set apart for the payment of the

(*y*) Per Sir J. Stuart, in *Fraser* v. *Thompson*, 1 Giff. 49, 62; *Kevan* v. *Crawford*, 6 Ch. D. 29; ante, p. 91.

(*z*) *Campion* v. *Cotton*, 17 Ves. 263 a; ante, p. 89, as to the setting marriage settlements aside; and see *Barrow* v. *Barrow*, 18 Beav. 529; *Bulmer* v. *Hunter*, L. R. 8 Eq. 46.

(*a*) *Gooch's Case*, 5 Rep. 60 b; *Apharry* v. *Bodingham*, Cro. Eliz. 350; ante, pp. 165, 166.

(*b*) *Mathews* v. *Jones*, 2 Anstr. 506.

(*c*) 7 Beav. 112; *Spackman* v. *Timbrell*, 8 Sim. 253.

debts should, until the estates were sold, be paid to the husband. Since those estates had been sold, upon an account taken after a lapse of about thirty years, during which great fluctuations had taken place in the value [* 334] *of the land, without one word said of explanation, either as to the cause of the delay or the cause of the defalcation which had taken place, the produce of the land was found insufficient for the full payment of the debts and the interest which had accumulated upon them.

So a settlement on marriage of leaseholds or other personal estate derived by will, if the bequest has been assented to, is good against the creditors of the ancestor (*d*).

To *what* marriage consideration applies.

Of course, if the marriage then contemplated does not take place, the consideration wholly fails (*e*); and till such marriage takes place, the contract is not executed, and the trusts cannot come into operation. If, then, either the actual parties live together unmarried and have children, or if being within the prohibited degrees they go through the ceremony of marriage (*f*), in either case the trusts created by the settlement can never come into existence, because the intention to provide for all their issue is defeated (*g*). Such contract can then be rescinded, and such trust put an end to (*h*).

Effect of marriage on the personal property of wife.

Before the Married Women's Property Act, 1882 (*i*), all the unsettled personal property of the wife which accrued to her during the marriage became by the marriage the property of the husband and his creditors. If the husband's settled property was decreed to be restored to his creditors, there could be no restitution to the wife of her unsettled property, and she must lose it, as well as those rights under the settlement in consideration of which she parted with her own (*k*).

(*d*) *Spackman* v. *Timbrell*, 8 Sim. 260; *Dilkes* v. *Broadmead*, 2 D. F. & J, 566.

(*e*) *Chapman* v. *Bradley*, 33 Beav. 61, S. C. 4 De G. J. & S. 71; and see *Coulson* v. *Alison*, 2 Giff. 279, S. C. 2 D. F. & J. 521; post, pt. v. ch. iv.

(*f*) *M'Donnell* v. *Hesilrige*, 16 Beav. 346; *Essery* v. *Cowlard*, 26 Ch. D. 191.

(*g*) *Pawson* v. *Brown*, 13 Ch. D. 202; see Dav. Prec. 4th ed. vol. 3, 11.

(*h*) *Chapman* v. *Bradley*, 4 De G. J. & S. 71; see Elph. Deeds, 331, 332.

(*i*) 45 & 46 Vict. c. 75, ss. 1 (1), 2, 5.

(*k*) See per Lord Hardwicke in *Harvey* v. *Ashley*, 3 Atk. 611, infra; Fry, Sp. Pf. 2nd ed. 415–416.

There are no doubt some cases in which the Court will set aside a settlement as to part of the property comprised in it. *Lester* v. *Garland* (*l*) is a case of that kind.

But where there are reciprocal settlements [335] and the consideration of marriage occurs, it is necessary to observe all the circumstances. Two things are involved: there is the marriage itself, as it affects the personal rights and duties and disabilities; there is also the settlement, as it affects the property of both parties. In setting aside a settlement or conveyance made on pecuniary consideration as void against creditors there is no difficulty about restitution. The property is restored and the money repaid. Both parties are by the decree of the Court remitted to their previous position, and the settlement or conveyance set aside.

Peculiarity of consideration of marriage that restitution is impossible.

But when marriage is the consideration, restitution is impossible. Therefore it is that in the case of *Campion* v. *Cotton* (*m*), notwithstanding the strong circumstances shewing fraud against the creditors, the paramount value of the consideration of marriage supported the settlement. The circumstances of that case were very remarkable, for the settlement was made in order to withdraw the property from the creditors and secure a provision for the intended husband and wife at the expense of his creditors. He was greatly embarrassed, and the wife well knew his pecuniary difficulties. There was a false recital in the settlement that the stock settled had been purchased with her money. He had transferred into the name of his wife sums of stock not his own property, but the property of persons for whom he acted as broker. Notwithstanding all these circumstances, because the marriage was legally contracted the Court refused to set the settlement aside. The ground of the decision was, the paramount force and value of the consideration of marriage and the impossibility of restitution, from the nature of the marriage contract (*n*).

Campion v. *Cotton.*

In *Hogan* v. *Healey* (*o*) a father gave a promissory

(*l*) 5 Sim. 205, in which a settlement of the husband's estate so that his life interest ceased on his bankruptcy was held good as to so much as was equal to the amount of the wife's portion which was not settled; post, p. 337.

(*m*) 17 Ves. 263, a; see *Kevan* v. *Crawford*, 6 Ch. D. 29; ante, p. 91.

(*n*) Per Sir J. Stuart in *Fraser* v. *Thompson*, 1 Giff. 63.

(*o*) 11 Ir. Rep. C. L. 122; and see *Johnston* v. *Johnston*, 32 W R. 1016, S. C. 33 W. R. 239.

note in consideration of his daughter's marriage, relying on the reported solvency of his daughter's future husband. It was admitted this was a misrepresentation. It was held that, as the marriage was the consideration for the promissory note, and could not be undone, the father could not avoid it, even for a fraud practised on him during the treaty for marriage.

Superiority of and difference between marriage and other contracts.

[* 336] *This superiority of the consideration of marriage arises partly from the fact that in setting aside an ante-nuptial agreement it is impossible to reinstate the contracting parties in their former position and unmarry the parties (*p*), and partly because interests of other parties than those whose hands are actually joined in wedlock are at stake. As Lord Hardwicke said (*q*), "these agreements differ from all others; the principal consideration is the marriage; settlements are prudential acts, done chiefly for this consideration, and the estate settled may be greater or less, according to the discretion of the parties; as soon as the marriage is had, the principal contract is executed, and cannot be set aside or rescinded; the estate and capacities of the parties are altered, the children born of the marriage are equally purchasers under both father and mother; and therefore it has been truly said that marriage contracts ought not to be rescinded, because it would affect the interests of third parties—the issue," and that the children may compel a settlement although either or both of the parents, the actual parties to the contract, neglect or refuse to perform it (*r*). Even "If a husband on his marriage in consideration of disparity of years or any other personal consideration, will make a very large settlement, whatever that is, the parties claiming under it, whether wife or children, are entitled to have that carried into execution according to the intent, notwithstanding the husband has agreed in an extraordinary liberal manner, beyond what is the rule." (*s*).

Each party bound, independently of the others.

The view thus taken by Lord Hardwicke has been followed by later decisions. Thus in *Rancliffe* v. *Parkyns* (*t*) Lord Eldon (*u*) observed that the consider-

(*p*) *North* v. *Ansell*, 2 P. Wms. 618.
(*q*) See *Harvey* v. *Ashley*, 3 Atk. 610.
(*r*) *Rancliffe* v. *Parkyns*, 6 Dow. 149; *Chilliner* v. *Chilliner*, 2 Ves. 528; and *Mills* v. *Borthwick*, 11 Jur. (N.S.) 558; *Jeston* v. *Key*, L. R. 6 Ch. 610.
(*s*) *Prime* v. *Stebbing*, 2 Ves. 409.
(*t*) 6 Dow. 149. (*u*) 6 Dow. 209.

ation of marriage is not like the consideration in other contracts. In a contract between A. and B. if A. does not make it good on the one hand B. is not bound on the other. But not so in the case of marriage; for if the mutual issue are purchasers, though it is not made good by one of the parties, the issue have a right to say, You shall each of you do what you can do, and we must not be disappointed (*u*). And it seems that even though the portion mentioned in the settlement was not paid, the *issue are equally purchas- [* 337] ers, for they take under both parties, and whether *they* perform their agreement among themselves may be immaterial to the issue; they are purchasers under both, and consequently both are obliged to perform (*v*), and failure of the consideration covenanted to be paid by the husband or wife will not make the benefits received by him or her in return for it void or even voluntary (*w*).

Issue purchasers.

In *Jeston* v. *Key* (*x*) a marriage contract was entered into between the husband and the wife's father. Both agreed to make a settlement, and this agreement was not performed by either party. But the contract was partly performed by the marriage. The wife died without issue, and the father, who had entered into certain covenants, was also dead.

Jeston v. *Key*.

It was held by the Court of Appeal that although the husband had not performed his part, he had a right to claim against the father's estate under his covenant; as the performance by one was not a condition precedent to his right to claim against the other.

As to the other reason for the value of the consideration of marriage, the impossibility of restoring them to the status in quo—either as to property or as to their mutual relationship—in *Fraser* v. *Thompson* (*y*), where it was attempted to set aside the settlement only as to the husband's property, Sir J. Stewart, V.C., said, "this view presents various difficulties. The settle-

Parties cannot regain their former position.

(*u*) *Rancliffe* v. *Parkyns*, 6 Dow. 149; *Chilliner* v. *Chilliner*, 2 Ves. 528; and *Mills* v. *Borthwick*, 11 Jur. (N. S.) 558; *Jeston* v. *Key* L. R. 6 Ch. 610.

(*v*) Per Lord Hardwicke in *Ramsden* v. *Hylton*, 2 Ves. 309; and see *Campbell* v. *Ingilby*, 21 Beav. 567.

(*w*) *Campbell* v. *Ingilby*, 21 Beav. 567; and see *Lee* v. *Lee*, 4 Ch. D. 175.

(*x*) L. R. 6 Ch. 610.

(*y*) 1 Giff, 49, 62, 63, S. C. reversed on a different point, 4 De G. & J. 659.

ment of the husband's property is part of the consideration for the settlement of the wife's. If the husband's property is to be restored to his creditors, it is impossible to restore to the wife that state of enjoyment of her property which she had before the marriage. By the settlement of her property and by the marriage she parted with the absolute dominion of her own property and person, on the faith of the settlement of her husband's property. These difficulties as to restitution, when duly examined, illustrate the principle on which settlements made in consideration of marriage are supported against creditors where a pecuniary consideration, however adequate in point of value, would be insufficient. But the difficulty extends beyond the effect of the settlement on the wife's property included in it."

Interest to husband in his own property to cease on bankruptcy void,

[*338] *A man cannot, on his marriage, settle his own property in such a manner that in the event of his bankruptcy his wife shall be entitled to a provision out of it in prejudice to his creditors (*z*). Thus where a bond was given to the future wife's father for £500, payable at a day certain, but defeasanced not to be put in suit, but for security of the daughter in case any misfortunes should happen to the husband, and then to be paid before other creditors, the bond was held fraudulent on the face of it, to disappoint creditors (*a*).

So a man cannot on his marriage settle his own property, real or personal, so as to take an interest under the settlement, defeasible on his bankruptcy (*b*).

or to wife if settlement by her is made after 1882.

And after 1882, by virtue of the Married Women's Property Act, 1882 (*c*), a woman, whenever married, will not, it is submitted, be able to settle her separate property upon herself, so as to be defeasible upon her bankruptcy (*d*).

But where, in consideration of a portion of £1000 with his wife, a husband, on marriage, settled his own

(*z*) Per Lord Manners in *Higginson* v. *Kelly*, 1 Ball & B. 252,255.
(*a*) *Wise's Case*, Sel. Ca. Ch. 46, 8vo ed. p. 128.
(*b*) *Lockyer* v. *Savage*, 2 Stra. 947; *Ex parte Murphy*, 1 Sch. & Lef. 44; *Higginbotham* v. *Holme*, 19 Ves. 88; *Phipps* v. *Lord Ennismore*, 4 Russ. 131; *Clarke* v. *Chambers*, 8 Ir. Ch. Rep. 26; and see *In re Pearsons*, 3 Ch. D. 807, supra, p. 68; Robson, Bkcy. 5th ed. 474, 475.
(*c*) 45 & 46 Vict. c. 75, ss. 2, 5, 19, 25.
(*d*) 45 & 46 Vict. c. 75, s. 1 (5).

real estate on trust to pay the interest to him until he should sell, mortgage, assign, or encumber the same, or should become bankrupt, and then on trust to pay to the wife £300 a year for her separate use, and he first mortgaged it and then became bankrupt; it was held that the wife became entitled to the annuity when he mortgaged the estate, and that, her title having then vested, it was unnecessary to consider whether the limitation over on his bankruptcy was valid (*e*). Estate defeated by mortgage before bankruptcy.

But a similar limitation of property belonging to the wife (*f*), or of a legacy to which she became entitled during coverture (*g*), or of property coming from the wife's friends (*h*) or even coming on *the hus- [*339] band's side from a third party (*i*) or, if the settlement was bonâ fide a matter of bargain of property coming partly from a third party and partly from the husband himself (*k*) will be good against his creditors. If the wife's, valid.

And where the property settled, though strictly speaking the husband's, is in reality what came from the wife's side, such a limitation of it will be upheld (*l*); and a limitation of this nature of the husband's property is valid for so much as is equal to the amount of his wife's portion (*m*); and where the amount brought into settlement by the wife exceeds the amount limited to the husband until his bankruptcy, the limitation over will be good (*i*). Partly the wife's, valid pro tanto.

These principles seem to apply to a settlement made after 1882 upon a woman of property belonging to or derived from the husband, which will in a similar case be good against her creditors (*n*) either wholly or pro tanto. Similarly if husband's and settlement made after 1882.

In no case, however, can property be limited to a man in such a manner as to prevent his creditors from obtaining any interest in it on his bankruptcy, although Creditors cannot be excluded from property which a man is to enjoy.

(*e*) *Brooke* v. *Pearson*, 5 Jur. (N.S.) 781.
(*f*) *Ex parte Meaghan*, 1 Sch. & Lef. 179; *Ex parte Hinton*, 14 Ves. 598; *Ex parte Cooke*, 8 Ves. 353; *Stockwell* v. *Yeates*, 17 W. R. 23.
(*g*) *Montefiore* v. *Behrens*, L. R. 1 Eq. 171.
(*h*) *Ex parte Oxley*, 1 Ball & B. 257.
(*i*) *Lewis* v. *Butler*, 16 W. R. 681.
(*k*) *Hammonds* v. *Barrett*, 17 W. R. 1078.
(*l*) *Higginson* v. *Kelly*, 1 Ball & B. 252.
(*m*) *Lester* v. *Garland*, 5 Sim. 205; and see Robson, Bkcy. 5th ed. 475.
(*n*) 45 & 46 Vict. c. 75, ss. 1 (5), 19, 25.

he is still to get the benefit of it. Such a limitation can only be made with a view to defraud creditors (*o*).

Goods settled on wife for the purposes of her trade.

But goods and chattels, such as furniture or stock in trade, which, before the marriage, belonged to the wife, might by marriage settlement be conveyed to trustees, to enable her to carry on her business separately; and if the husband has not intermeddled with them, and there be no fraud, such effects are not liable to the husband's debts. But whether the trade has been carried on solely by the wife or jointly with the husband is a question of fact for a jury, and, if they determine the latter, the stock in trade is liable to the husband's debts, but not the furniture, although removed to the husband's house (*p*).

Not for trade.

[* 340] *This applied also where furniture or other personal chattels were so settled without any intention of trading, though of course the husband's creditors would be entitled to any income from them during the interest of the debtor in them (*q*); and the mere absence of any schedule or inventory of the goods was no proof of fraud (*r*). And though if there *is* a schedule articles not included in it would in general be liable to the husband's debts (*q*), yet where (*s*), on the marriage of a woman who had previously been in trade, a settlement was made of all the articles mentioned in the schedule thereto, "and all her stock in trade, materials, and other articles then belonging to her in and about her said business," it was held that a horse and chaise, which she had always been in the habit of using for visiting her customers, passed to the trustees, although not mentioned in the schedule.

No schedule.

Husband indebted at time of settlement.

Where the husband is "indebted" at the time, such a settlement, to be valid against creditors, must be ante-nuptial or for value (*t*); for the same principle

(*o*) *Brandon* v. *Robinson*, 18 Ves. 429; *Rippon* v. *Norton*, 2 Beav. 63; *Dommett* v. *Bedford*, 3 Ves. 149. In these cases the limitations were not in marriage settlements. But see *Holmes* v. *Penney*, 3 K. & J. 90, 100, ante, pp. 110, 111.

(*p*) *Jarman* v. *Woolloton*, 3 T. R. 618; *Haselinton* v. *Gill*, ibid. 620, n.; *Dean* v. *Brown*, 8 Dowl. & Ry. 95; and see now 45 & 46 Vict. c. 75, ss. 2, 5.

(*q*) *Cadogan* v. *Kennett*, 2 Cowp. 432; *Simmons* v. *Edwards*, 16 M. & W. 838.

(*r*) *Jarman* v. *Woolloton*, 3 T. R. 618, 622; and see *Weeks* v. *Maillardet*, 14 East, 568; *England* v. *Downs*, 2 Beav. 522, 536.

(*s*) *Dean* v. *Brown*, 8 Dowl. & Ry. 95.

(*t*) See ante, pp. 34 et seq., 78 et seq.

applies where the settlement is after marriage and on valuable consideration between husband and wife (*u*). But in order to make valid against the husband's creditors a post-nuptial settlement of furniture or other personal chattels of which the husband or husband and wife jointly retain the apparent possession it must be registered as a bill of sale, although supported by a valuable consideration (*v*). Post-nuptial settlement for value.

And there seems no reason why a mere voluntary post-nuptial settlement of furniture or of stock in trade to enable the wife to carry on a separate trade, registered as a bill of sale, and made when the husband was not indebted, and without meaning to defraud subsequent creditors, should not be valid against his creditors although the transfer was not followed by any apparent change of possession (*w*). Voluntary.

*The provisions of a marriage settlement [*341] cannot extend to what was not contemplated by the parties at the time; and whether or not a re-marriage between a husband and wife previously divorced would be valid, it is certain that the children of such a union could not take any benefit under a settlement made on the first marriage of their parents, because such an event could not have been within the intention of the parties to the deed (*x*). Settlement on re-marriage after divorce.

In *Carr* v. *Taylor* (*y*) the question was said to be whether the husband was purchaser of the whole fortune of his wife including any future accessions, or only of that which he was actually to receive with her at marriage; and that, to make him a purchaser of the whole, the settlement must clearly express or import that intention.

All the limitations to the husband, wife and issue are protected by the marriage consideration. So it was said in *Nairn* v. *Prowse* (*z*): "Every provision with regard to the husband and wife falls directly within the consideration; and the wife is interestsd in the provision for the husband as well as that for herself. The mar- All limitations to husband, wife, and issue protected.

(*u*) *Arundell* v. *Phipps*, 10 Ves. 139, 150.
(*v*) *Ashton* v. *Blackshaw*, L. R. 9 Eq. 510; ante, pp. 147, 153.
(*w*) See *Dewey* v. *Bayntun*, 6 East, 267; ante, pp. 36 et seq.
(*x*) *Bond* v. *Taylor*, 2 J. & H. 473; *Essery* v. *Cowlard*, 26 Ch. D. 191; ante, p. 334; post, pt. v. ch. v.
(*y*) 10 Ves. 578.
(*z*) 6 Ves. 758; post, pp. 342 et seq.

riage is consented to in consideration not only of her interest in the event of survivorship, but of his income and the provision he is thereby enabled to make for her and her children during his life. It is not material that when the provision is made for the husband it may be liable to his debts" (*a*).

Even after death of husband and wife.

Even after the death of the husband or wife without issue the consideration of the marriage remains (*b*). So if a settlement is made by a father, upon the marriage of his son, upon the husband and wife for their lives, and afterwards upon the children, and the wife dies without any issue, and therefore the husband is the only object, it could not be contended that the father's creditors could impeach that settlement and take from the son the provision for his life (*c*); and a settlement of [*342] lands may, after *the death of husband and wife and issue, be enforced by the heir if the covenant or if any of the uses of the settlement subsist at the death of the covenantor (*d*).

Settlement made on marriage of a stranger, good.

The consideration will be extended also to a settlement made on the marriage of a stranger, for it is not from the relationship between the settlor and the settlee that the creditors or purchasers are debarred (*e*)

By married woman of separate estate.

A married woman might even before 1883 charge her separate property by a gift on marriage to a stranger, who would not be considered a volunteer (*f*).

Consideration of marriage the same whether any portion or not.

The value of the marriage consideration is apart from and independent of any money consideration which may pass between the parties by way of portion or other-

(*a*) See also Lane, 22; *Pulvertoft* v. *Pulvertoft*, 18 Ves. 92; *Barham* v. *Clarendon*, 10 Hare, 126.

(*b*) *Jeston* v. *Key*, L. R. 6 Ch. 610.

(*c*) *Nairn* v. *Prowse*, 6 Ves. 752–9; and see *O'Gorman* v. *Comyn*, 2 Sch. & Lef. 148. Divorce does not give the Court jurisdiction to set aside the marriage settlement; *Evans* v. *Carrington*, 29 L. J. Ch. 330. See *Merryweather* v. *Jones*, 10 L. T. (N.S.) 62. As to the jurisdiction of the Probate Division to alter a marriage settlement, see 22 & 23 Vict. c. 61, s. 5; *Sykes* v. *Sykes*, L. R. 2 P. & D. 163; *Gladstone* v. *Gladstone*, 1 P. D. 442; *Benyon* v. *Benyon*, 1 P. D. 447; 41 Vict. c. 19, s. 3; *Yglesias* v. *Yglesias*, 4 P. D, 71; *Ponsonby* v. *Ponsonby*, 9 P. D. 122.

(*d*) *Lechmere* v. *Carlisle*, 3 P. Wms. 211; *Barham* v. *Clarendon*, 10 Hare, 132–3.

(*e*) *Nairn* v. *Prowse*, 6 Ves. 752–9.

(*f*) *Power* v. *Bailey*, 1 Ball & B. 49; and see now 45 & 46 Vict. c. 75.

wise, so that the quantum or inequality of pecuniary benefit does not in general affect the question (*g*).

Extent of consideration of marriage.

The question how far the consideration of marriage extends is one of great difficulty, and has given rise to a series of conflicting and inconsistent decisions from a very early period.

Consideration of marriage only supports limitations to husband, wife, and issue.

The general rule has been laid down to be that the valuable consideration of marriage extends only to support interests given to the husband, the wife, and the issue of the marriage, and to no other person or persons (*h*).

Two exceptions.

Two exceptions, however, were made to this general rule—one *was in favour of settlements made [*343] by a widow before marriage on her children or other issue of a former marriage, or even on her illegitimate children (*i*) ; the other was in favour of settlements made on the issue of either the husband or the wife by a *future* marriage (*k*).

According to this view, when other limitations were supported it was, either because they came within one of these two exceptions, or because of the considerations of the particular contract which extended to, and comprehended, the various interests of all the parties to the contract.

Effect of some old cases mis-stated in marginal notes.

As to the general rule, in several cases the marginal head-notes state that the case shews that the considera-

(*g*) *Ex parte Marsh*, 1 Atk. 158–9 ; *Brown* v. *Jones*, 1 Atk. 188, 190 ; *North* v. *Ansell*, 2 P. Wms. 618 ; *Harvey* v. *Ashley*, 3 Atk. 607 ; *Ramsden* v. *Hylton*, 2 Ves. 309 ; *Prebble* v. *Boghurst*, 1 Sw. 309, 319 ; *Nairn* v. *Prowse*, 6 Ves. 752, ante, p. 341.

(*h*) Case of *St. Saviour's in Southwark*, Lane, 21, 22 ; *Osgood* v. *Strode*, 2 P. Wms. 245 ; *Johnson* v. *Legard*, 6 M. & S. 60, S. C. in Chancery, T. & R. 281 ; *Sutton* v. *Chetwynd*, 3 Mer. 249 ; *Stacpoole* v. *Stacpoole*, 4 Dr. & War. 320, S. C. 2 Con. & Law. 489 ; *Ford* v. *Stuart*, 15 Beav. 495 ; *Cotterell* v. *Homer*, 13 Sim. 506 ; *Clarke* v. *Wright*, 6 H. & N. 870 ; *Smith* v. *Cherrill*, L. R. 4 Eq. 390 ; *Price* v. *Jenkins*, 4 Ch. D. 483 ; *Gale* v. *Gale*, 6 Ch. D. 144 ; *Mackie* v. *Herbertson*, 9 App. Cas. 303. See infra, where the above cases are all cited.

(*i*) *Newstead* v. *Searles*, 1 Atk. 265 ; *Clarke* v. *Wright*, 6 H. & N. 849 ; *Gale* v. *Gale*, 6 Ch. D. 144 ; infra, p. 349.

(*k*) *Jenkins* v. *Keymis*, 1 Lev. 150, 237, Hardr. 395, 1 Ch. Ca. 103 ; *Den.* d. *Vernon* v. *Ogle*, Lofft, 216–7 ; *Sutton* v. *Chetwynd*, 3 Mer. 249 ; *Clayton* v. *Wilton*, 3 Mad. 302, n., 6 M. & S. 67 ; *In re Cullen's Estate*, 14 Ir. Ch. Rep. 506 ; *Wollaston* v. *Tribe*, L. R. 9 Eq. 44 ; *Mackie* v. *Herbertson*, 9 App. Cas. 303 ; infra, p. 350.

tion of marriage runs through all the estates raised by the settlement; whereas, on reading the case, it appears this is not the fact, but that the decision went on the particular circumstances (*l*).

In the oldest reported case on the subject (*m*) it was held "that if a man doth, in consideration that his son shall marry the daughter of B., covenant to stand seised to the use of his son for life, and after to the use of other his sons in reversion or remainder, these uses thus limited in remainder are fraudulent against a purchaser, though the first be upon good consideration, viz., for marriage." In *Harvey* v. *Ashley* (*n*), Lord Hardwicke said: "The children born of the marriage are equally purchasers under both father and mother." So Lord Chief Justice Cockburn said in *Clarke* v. *Wright* (*o*): "I can come to no other conclusion than that a limitation in a marriage settlement in favour of the relations of the settlor, other than the issue of the marriage, is not within the consideration of the marriage, and therefore, in the absence of any other consideration, must be taken to be voluntary." In the case of *Smith* v. *Cherrill*, (*p*), Sir R. Malins, V.C., said: "I have [* 344] always understood and still understand * the law, as it was settled by the case of *Johnson* v. *Legard* (*q*), and by the same case as decided by Lord Eldon (*r*), and by many other cases, to be this: that when a marriage settlement goes beyond the immediate objects of the marriage, and (as in this case) there are provisions for collateral relatives from whom no valuable consideration moves, then, *quoad* those objects, the settlement has nothing to do with the marriage, but is to be considered as a settlement purely for the purpose of providing for those relatives."

Clarke v. *Wright.*

Smith v. *Cherrill.*

Mackie v. *Herbertson.*

So in the most recent case of *Mackie* v. *Herbertson* (*s*), in the House of Lords (though a Scotch decision), Lord Selborne, L.C., said: "The considerations of the contract, though founded on marriage, must, I appre-

(*l*) *Ithell* v. *Beane*, 1 Ves. 215; *Jenkins* v. *Keymis*, 1 Lev. 150; *Stephens* v. *Trueman*, 1 Ves. 73; *White* v. *Stringer*, 2 Lev. 105; see *Price* v. *Jenkins*, 4 Ch. D. 483.

(*m*) *St. Saviour's in Southwark*, Lane. 21, 22. See also 2 Roll. Abr. 784.

(*n*) 3 Atk. 610.

(*o*) 6 H. & N. 870.

(*p*) L. R. 4 Eq. 390.

(*q*) 6 M. & S. 60, S. C. 3 T. & R. 281.

(*r*) T. & R. 281, S. C. 3 Mad. 283.

(*s*) 9 App. Cas. 337.

hend, extend to all those terms of the contract on which depend the interest of the persons who are within the consideration of marriage; and when they take only on terms which admit to a participation with them others who would not otherwise be within the consideration, then not the matrimonial consideration properly so-called, but the considerations of the mutual contract extend to and comprehend them."

Osgood v. *Strade.*

The general rule was first clearly and definitely laid down in *Osgood* v. *Strode* (*t*), where (although a case in which limitations to collaterals were held valid from their having considerations other than that of the marriage to support them) Lord Macclesfield said: "The marriage and marriage portion support only the limitation to the husband and wife, and their issue; this is all that is presumed to have been stipulated for by the wife and her friends." This case was clearly put on the footing of a contract, the extent of which is, by presumption of law and by the *reason* of the value attached to the consideration of marriage, confined to the immediate objects of the marriage.

Jenkins v. *Keymis.*

Lord Hale's decision in *Jenkins* v. *Keymis* (*u*) at first sight appears to be opposed to this, where he is reported to have said: "The consideration of the marriage and of the marriage portion will run to *all the estates raised by the settlement*, although the marriage is not * concerned in them so as to make them [* 345] good against purchasers and to avoid a voluntary conveyance,"—words which have been often cited to shew that at that time it was thought that the marriage consideration would uphold any limitations in a settlement. But it is hard to see why these words should be carried beyond their most natural meaning, which is that they laid down no general proposition, but referred only to "the settlement" in that case. This not only reconciles this case with all the other authorities, but is confirmed by a case (*v*) decided a few years afterwards, in which the same judge took part, and where a limitation in a marriage settlement to a brother of the hus-

(*t*) 2 P. Wms. 245, 255, commented on in *Price* v. *Jenkins*, 4 Ch. D. 489, 490. See also *Staplehill* v. *Bully*, Prec. Ch. 224; *Reeves* v. *Reeves*, 9 Mod. 132, per Lord Macclesfield; *Basse* v. *Gray*, 2 Vern. 693; *Gray* v. *Legard*, 9 L. J. Ch. (O.S.) 80; *Ford* v. *Stuart*, 15 Beav. 499.

(*u*) 1 Lev. 150, 237, Hardr. 395, 1 Ch. Ca. 103; and see note (*y*) next page.

(*v*) *Roscarrick* v. *Barton*, 1 Ch. Ca. 217, 220.

band was held voluntary, shewing clearly that he did not think *every* limitation supported by the consideration (*w*).

The actual decision in *Jenkins* v. *Keymis*, however, that the limitation was not voluntary, is not opposed to the general rule. There was sufficient consideration apart from that of the marriage to uphold the limitation as valuable; and external considerations, whether inferred from the terms and nature of the settlement or supported by external proof, will support limitations not actually within the objects of the marriage (*x*).

Considerations other than that of the marriage.

Jenkins v. *Keymis*.

The case was thus: at the time of the settlement the father was tenant for life with remainder to the son (the husband) in tail male. By the settlement the estate was limited to the father for life, remainder to the son and his wife for their joint lives, and to the heirs male of the body of the son upon the body of his wife to be begotten, remainder to the heirs male of the body of the son with remainders over (*y*). This seems to come within the meaning of Lord Eldon's words (*z*), when he mentioned the case of persons not within the consideration of marriage directly, but who have always been so considered, preventing the effect of the statute. "In the case, for instance," he says, "of a [* 346] father, tenant for life, with *remainder to his son in tail, they may agree, upon the marriage of the son, to settle, not only upon his issue, but upon the brothers and uncles of that son; and the question would be whether they, though not within the consideration of the marriage, are not within the contract between the father and the son; both having a right to insist upon a provident provision for uncles, brothers, sisters, and other relations, and to say to each other, 'I will not agree unless you will so settle.' The Court has held such a claim not to be that of a mere volunteer; but as falling within the range of the consideration; and therefore these statutes would not bear upon it."

Father tenant for life, remainder to son in tail.

(*w*) In *Den.* d. *Vernon* v. *Ogle*, Lofft, 216, *Jenkins* v. *Keymis* was spoken of as within one of the exceptions to the general rule; see 1 Lev. 237, and post, pp. 353, 356.

(*x*) *Clarke* v. *Wright*, 6 H. & N. 849, 877; *Price* v. *Jenkins*, 4 Ch. D. 486–488, S. C. 5 Ch. D. 619; *Gale* v. *Gale*, 6 Ch. D. 144; *In re Sheridan*, L. R. 1 Ir. 54; *Mackie* v. *Herbertson*, 9 App. Cas. 303.

(*y*) Hardr. 395, 1 Lev. 237. But see 1 Lev. 150 and 1 Ch. Ca. 103, where the limitations are rather differently stated.

(*z*) In *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84, 92; post, pp. 363, 364.

This case was commented on by Hall, V.C., in *Price* v. *Jenkins*, (*a*), and there explained to be a special bargain between father and son for that particular settlement, as well as a contract which arose from, and was supported by, the consideration of the portion coming from the wife.

First exception. Children or issue of a *former* marriage, or illegitimate children.

One exception to the general rule (*b*) has been made in the case of a settlement by a *widow* on her marriage, in favour of her children or other issue of a former marriage, or her illegitimate children.

Newstead v. *Searles*.

This was first laid down by Lord Hardwicke in *Newstead* v. *Searles* (*c*).

The facts in that case were as follows:—A widow, having two grandchildren unprovided for, on her second marriage, with her intended husband's concurrence, settled her lands (if no issue of the marriage) on her said grandchildren equally, provided that any child or children of the then marriage should have an equal share with the grandchildren. Lord Hardwicke held the limitation to the grandchildren valid. He said: "The question is, whether the articles of the 30th of April 1709 are for a valuable consideration and binding, or ought to be considered as voluntary and fraudulent, with respect to subsequent creditors or purchasers? If I was to lay it down as a rule that such articles as these are not binding, it would become impossible for a widow on her second marriage to make any certain provision for the issue of a former, and the second *hus- [*347] band might then contrive to defeat the provision made for those children. I am of opinion that these articles ought not to be considered as a voluntary agreement, and that the plaintiffs are entitled to relief in this Court. This is the case of a widow, who has two children by a former husband, and no provision made for them, and those two children have each of them a child, and the mother being in possession in her own right of freehold estate, leasehold, and copyhold, the second husband, if there had been a child born alive, would have been entitled to be tenant by the curtesy of the freehold, and also to the leasehold and copyhold immediately upon the marriage."

(*a*) 4 Ch. D. 487, 488.

(*b*) Supra, p. 342; *Chapman* v. *Emery*, Cowp. 278, 280; Cruise, Dig. 4th ed. vol. 4, p. 443; *Ithell* v. *Beane*, 1 Ves. 215; *Chapman* v. *Bradley*, 33 Beav. 65; *Gale* v. *Gale*, 6 Ch. D. 144.

(*c*) 1 Atk. 265.

It should be observed that Lord Hardwicke in this case really decided two questions.

The first was that the grandchildren of the first marriage could maintain a bill for performance of the articles of settlement, although no consideration moved from them, and although they were not parties to those articles.

The second was that the statute of 27 Eliz. c. 4, did not apply, and that therefore the grandchildren were not volunteers, so far as related to the consideration (*d*).

Clarke v. *Wright.*

In the leading case of *Clarke* v. *Wright* (*e*) the case of *Newstead* v. *Searles* (*f*) was carefully reconsidered and followed both by the Court of Exchequer (*g*) and the Court of Exchequer Chamber (*h*), but upon different grounds in the two Courts.

The settlement in that case was of real estate, and was made by *a widow* on her second marriage on herself for life, remainder, as to part, to her husband for life, with remainder to her own illegitimate son, and as to the other part to the son in fee. After the marriage she and her husband mortgaged the property.

The only question for the decision of the Court was whether the limitation in this settlement to the illegitimate son was valid, as against a subsequent mortgagee, under 27 Eliz. c. 4.

Baron Channell, in delivering the judgment of the [* 348] Court of *Exchequer, referred to *Newstead* v. *Searles* (*i*), and said: "It was a direct authority that a settlement by a widow, about to marry, upon her children by a former marriage, is good against a subsequent mortgagee."

In the Court of Exchequer Chamber Lord Chief Justice Cockburn, after elaborately commenting on the

(*d*) *Gale* v. *Gale*, 6 Ch. D., per Fry, J., 148, 149.
(*e*) 6 H. & N. 849.
(*f*) 1 Atk. 265.
(*g*) *Dickenson* v. *Wright*, 5 H. & N. 401, 412.
(*h*) 6 H. & N. 873.
(*i*) 1 Atk. 265. See *Ex parte Marsh*, 1 Atk. 158; *King* v. *Cotton*, 2 P. Wms. 674; *England* v. *Downs*, 2 Beav. 522; *Rock* v. *Dade*, Mth. S. 1709, post, Appendix No. XIII., commented on in *Price* v. *Jenkins*, 4 Ch. D. 485, 486.

doctrine that collaterals and third parties are not within the actual consideration of the marriage itself, and expressing an opinion that in that case no external consideration could be presumed or allowed, went on to say: "Nevertheless I am of opinion that this limitation should be upheld. Upon the rule that in a marriage settlement a limitation in favour of the relations of the settlor, other than the issue of the marriage, will be invalid, two exceptions have, it seems to me, been engrafted by very high authority. In *Newstead* v. *Searles* (*k*) Lord Hardwicke held that in a marriage settlement the settlor might introduce a limitation in favour of the children of a former marriage (*l*); while in *Clayton* v. *The Earl of Wilton* (*m*) Lord Ellenborough and the Court of King's Bench upheld against a purchaser for value a similar limitation in a marriage settlement, in favour of the issue of the settlor by a future wife in default of issue of the intended marriage. These decisions have never, so far as I am aware, been impugned. The decision of Lord Hardwicke in *Newstead* v. *Searles* (*n*), which has now stood for upwards of a century, is cited by Lord St. Leonards in a recent work as an existing authority. It is evident that Lord Hardwicke considered that a provision in a marriage settlement in favour of existing children could not be deemed fraudulent within the statute. It may be that these decisions would not stand the test of a very strict analysis or rigorous logic; but it must be borne in mind that the rule on which this exception was engrafted was itself the result of a very forced and arbitrary construction of the statute. It is not to be *won- [* 349] dered at that judicial exposition stopped short of applying it when the consequence was to prevent the owner of property, on making a settlement on marriage, from making any binding provision for his existing children. We ought not, in my judgment, to overrule the cases to which I have referred. Having stood thus long unimpeached, they may have led to the introduction of similar provisions into many settlements, and we cannot tell what mischief we may occasion by overturning them,

(*k*) 1 Atk. 265; West, t. Hardw. 287.

(*l*) This statement does not appear to be borne out by the case itself. Lord Hardwicke simply decided this point when such settlement was made by a *widow*. See his judgment supra, p. 346. It has moreover been doubted whether different considerations did not apply when such settlement was made by a *widower*. See infra, pp. 352 et seq.

(*m*) 3 Mad. 302, n.

(*n*) 1 Atk. 265.

while no mischief can arise from sanctioning such limitations beyond what arises from their introduction in favour of the issue of an intended marriage. The present case appears to me to come directly within the principle of *Newstead* v. *Searles* (*o*). It was as much the duty of the settlor M. D. to make provision for her illegitimate son as though he had been legitimate."

On this case, Hall, V.C., in *Price* v. *Jenkins* (*p*) observed that it would be very difficult to apply the principle of its decision to any other case not exactly similar in its circumstances. The grounds of the decisions were different in the Court of Exchequer, where the case was first determined by four judges, from those in the Court of Appeal; and the grounds of the decision in that Court not only differed, but differed as regarded the judges who agreed with the decision of the Court of Exchequer.

Gale v. *Gale.*

These cases were again carefully reviewed by Lord Justice Fry, then Mr. Justice Fry, in *Gale* v. *Gale* (*q*), and followed.

In that case, a widow, on her second marriage, by a settlement to which she and her intended husband and a trustee were parties, in pursuance of an agreement between her and her intended husband, covenanted with the trustee to surrender certain copyhold premises to him, to be held by him upon trust for her for life for her separate use, and after her decease upon trust for her children by her first husband and their children. She died after her second husband, having devised the copyhold premises (which had not been surrendered) to her children absolutely, except one cottage, which she devised to her sister for life.

[* 350] Fry, J., after pointing out that there was consideration for the *settlement but no consideration from the children, and commenting on *Newstead* v. *Searles* (*o*), said: "It seems to me that *Newstead* v. *Searles* (*o*) is all that is necessary for determining this case. I find here a widow with children by a former marriage, an agreement for a settlement upon those children, a husband giving up a benefit, a wife dealing with her property, and a marriage upon this agreement,

(*o*) 1 Atk. 265.
(*p*) 4 Ch. D. 485.
(*q*) 6 Ch. D. 144.

and the issue of the first marriage instituting proceedings, and I find in that case the same circumstances and the Court confirming the articles of settlement." He then referred to the judgment of Lord Chief Justice Cockburn in *Clarke* v. *Wright* (*r*) as a most emphatic approbation and adoption of *Newstead* v. *Searles* (*s*) in its integrity.

In the most recent case of *Mackie* v. *Herbertson* (*t*) in the House of Lords, a settlement by a widow on her second marriage, upon her children by her first husband, was upheld; but upon a different ground from that given by Mr. Justice Fry in *Gale* v. *Gale* (*u*) as the ground of his decision, or in his view of Lord Hardwicke in *Newstead* v. *Searles* (*s*). *Mackie* v. *Herbertson.*

In that case the question was the construction of a Scotch ante-nuptial settlement. The widow and her then intended husband by ante-nuptial contract of marriage, to which they alone were parties, conveyed to trustees all her real and personal property, upon trust for life, and after her decease "for behoof of the children procreated and to be procreated of the body of the said Mrs. H. C. or M." as she should by writing appoint, and in default among them in equal shares. She had then living three children of the first marriage.

Lord Selborne, L. C. in the course of his judgment, said: "If any English authorities were fit to be regarded in a question of this kind as to what is and what is not within the consideration of the contract, the cases of *Newstead* v. *Searles* (*s*) and *Clayton* v. *Lord Wilton* (*v*) would be very much to the purpose. *Newstead* v. *Searles* (*s*) was a case of this kind. There was a marriage contract, and there was a gift in remainder to the existing children of a former marriage, subject to letting in those who might afterwards be born of the intended marriage; and when they came into * existence the state of things would be [*351] such as we have here. Upon those circumstances Lord Hardwicke, a very great judge, entertained no doubt that the considerations of the contract included the earlier children, because their interests and those of

(*r*) 6 H. & N. 849, 873.
(*s*) 1 Atk. 265.
(*t*) 9 App. Cas. 336, 337, 342.
(*u*) 6 Ch. D. 144; *supra*, pp. 349, 350.
(*v*) 3 Mad. 302, n.

the children of the marriage which afterwards took place were so dealt with that the stipulations for those children who were within the marriage consideration were made dependent upon the agreement that the others should take as they did. The children within the consideration were to take upon certain terms, and without giving them either more or less than that which the contract gave them it was impossible to disappoint the others. Exactly the same was the principle of the case of *Clayton* v. *Lord Wilton* (*w*), though the form in which the question was raised was different, because it was a limitation by way of remainder occurring after a gift to male issue who were within the consideration of marriage, and before another gift to female issue in the like situation. I should hesitate very much to rely upon English authority in any case in which there was really Scotch authority to the contrary, even when the matter decided in the English cases was upon a point which in reason ought to be common to the jurisprudence of all countries. The considerations of the contract, though founded on marriage, must, I apprehend extend to all those terms of the contract on which depend the interests of the persons who are within the consideration of marriage; and when they take only on terms which admit to a participation with them others who would not otherwise be within the consideration, then not the matrimonial consideration properly so-called, but the considerations of the mutual contract extend to and comprehend them."

Such settlement upheld on *two* different grounds.

It will be seen from these cases that a settlement made by a widow on her marriage on her children or other issue of a former marriage or her illegitimate children, has been upheld, against a creditor or a subsequent purchaser for value, on two quite different grounds.

1. As an exception.

On the one ground, such settlement has been treated as an exception to the general rule (*x*), and that from the earliest cases to the case of *Gale* v. *Gale* (*y*).

2. As a question of *bargain*.

[*352] *On the other ground, and, it is submitted, the ground which will be now adopted by the Court after the case of *Mackie* v. *Herbertson* (*z*) in the House

(*w*) 3 Mad. 302, n. (*x*) Ante, p. 342.
(*y*) 6 Ch. D. 144; see Eversley, Dom. Rel. 164, 135.
(*z*) 9 App. Cas. 303.

of Lords (although a decision on a Scotch case) as the more accurate one, such settlement will be treated as made for value or not, according as it is or is not *a bargain*. There will in this view be no question whether a *widow's* children or other issue of a former marriage or illegitimate children are or are not within the marriage consideration. The question will simply be, was there a bargain on behalf of them or not, on her remarriage?

It will be observed that *Newstead* v. *Searles* (*z*) was in the case of *Mackie* v. *Herbertson* (*a*) so explained by Lord Selborne, L.C.; and also that this was the view taken in *Clarke* v. *Wright* (*b*) by both Blackburn and Willes, JJ.

Settlement by *widower* on children or issue of former marriage or illegitimate children.

It has been a question whether, to the case of a settlement made by a *widower* on his marriage in favour of his children or other issue by a former marriage, or of his illegitimate children, the same principle of bargain or no bargain ought to be applied; or whether it should also be treated as an exception to the general rule.

The grounds on which such settlements by a widower have been supported as for value, or held voluntary, are the same two grounds as those in the case of such settlements by a widow.

In the very early case of *Ithell* v. *Beane* (*c*) a man on his second marriage made a settlement of personal estate in favour of his wife for life, remainder to the issue of her marriage, together with his son by his former wife, and devised to him his real estate. Lord Hardwicke upheld this settlement against creditors as a contract between the husband, his second wife, and her friends, and so far like *Osgood* v. *Strode* (*d*), it being provided in the agreement that the son by the former wife should come in for a share, which was a bargain for valuable consideration.

It seems to have been assumed, however, in the judgment of Lord Chief Justice Cockburn in *Clarke* v. *Wright* (*e*), that the * principle of *Newstead* v. [* 353]

(*z*) 1 Atk. 265; West, t. Hardw. 287.
(*a*) 9 App. Cas. 303.
(*b*) 6 H. & N. 849, 859; post, p. 357.
(*c*) 1 Ves. 215.
(*d*) 2 P. Wms. 245; ante, p. 344.
(*e*) 6 H. & N. 849; supra, p. 348.

Searles (*f*) applied, and that Lord Hardwicke's decision covered this case although his decision was only as to such a settlement when made by a *widow*.

Price v. *Jenkins.*

The authorities on this point were all carefully examined by Hall, V.C., in the case of *Price* v. *Jenkins* (*g*). In that case a *widower* on his second marriage assigned leasehold houses to trustees on trust for himself for life, with remainder to his son by his first wife (*h*).

It was held by Hall, V.C., that the settlement was an ordinary voluntary settlement by a father on his son, and, therefore, void against a purchaser for value. The ground on which the decision went was this, that there was not, upon the true construction of the settlement, any bargain between husband and wife that the intended husband should settle any of his own property upon his child by a former wife. He held that the cases of *Jenkins* v. *Keymis* (*i*), *Clayton* v. *Earl of Wilton* (*k*), *Ithell* v. *Beane* (*l*), *Clarke* v. *Wright* (*m*), were all consistent upon this view—that in each case there was a bargain for the particular settlement.

It is conceived that the true view is in this case the same as that in the similar case of such a settlement by a widow—namely, that the real question is, was there or was there not a *bargain* for the particular settlement?

Second exception, issue of *future* marriage.

The second exception to the general rule was that the issue of either husband or wife by a *future* marriage were held to be within the marriage consideration.

Clayton v. *Wilton.*

The case of *Clayton* v. *Wilton* (*n*) has usually been cited as establishing this. In that case T. C. on his marriage conveyed lands of which he was owner in fee to trustees to the use of himself for life, remainder to

(*f*) 1 Atk. 265.
(*g*) 4 Ch. D. 483, S. C. 5 Ch. D. 619; and see *Gale* v. *Gale*, 6 Ch. D., per Fry, J., 151, 152; and *In re Green*, 11 Ir. Rep. Eq. 502.
(*h*) It should be noticed that the limitations of the settlement given in 4 Ch. D. 483 and 5 Ch. D. 619 differ materially; in 4 Ch. D. 483, the husband has an estate for the joint lives of himself and wife, with remainder to the survivor for life. The report also does not state whether the wife was alive or dead.
(*i*) 1 Lev. 150.
(*k*) 3 Mad. 302, n.
(*l*) 1 Ves. 215.
(*m*) 5 H. & N. 401, 6 H. & N. 849.
(*n*) 3 Mad. 302, n., S. C. 6 M. & S. 67.

trustees to preserve contingent * remainders, [* 354] remainder to his wife for her jointure, remainder to the use of the first and other sons of the marriage in tail male, remainder to the use of the first and other sons of the said T. C. on the body of *any* woman or women he might happen to marry after the decease of the then intended wife successively in tail male, and remainders to daughters of the intended marriage, &c., remainder to T. C. and his heirs.

The wife died without issue; then the husband, before his second marriage, sold the lands, and he having issue by a second marriage the question was, whether the remainder to his first and other sons by *any* other wife was good against the purchaser. Lord Ellenborough, C.J., and the Court of King's Bench, on a case sent from Chancery, certified their opinion to be that the conveyance to the purchaser was not a good and valid conveyance against the issue of the second marriage.

As was customary at that time, the reasons for this opinion were not given.

Lord Chief Justice Cockburn in *Clarke* v. *Wright* (*o*) spoke of this decision as one that, so far as he knew, had never been impugned.

Second exception only supported when limitation to children of *future* marriage is between two limitations to children of then intended marriage

This second exception has been also supported on a very different and a much narrower ground, which only applies to a particular class of cases.

It has been supported because the limitations to children of a *future* marriage came between *two* limitations to children of the then intended marriage, each of which was a valid limitation, and if the intermediate limitation had been held invalid then the subsequent limitation must also have failed. Each limitation to children of the then intended marriage was good because it was within the consideration of marriage; and that was considered necessarily to involve holding the intermediate limitation to be also within the consideration of marriage.

It will be observed that this argument does not apply unless the limitation to children of a *future* marriage is followed by a limitation to persons within the con-

(*o*) 6 H. & N. 873; supra, p. 348.

[* 355] sideration of marriage; and *therefore many cases coming within this exception could not be so supported.

Roe v. *Mitton.* In the very early case of *Roe* v. *Mitton* (*p*) this ground seems to have been first taken by Wilmot, C.J., though the point does not appear to have been argued, and the limitation which was supported was in favour of a brother, and not children of a *future* marriage. Wilmot, C.J., there says: "In the present case the limitation to the daughters of the marriage, subsequent to the limitation in question, is very material, and distinguishes this case from all other the cases on this statute (*q*). It is true, indeed, that the limitations of a settlement may be partly good and partly void; but here the first is good, the last is good, and the intermediate one only is attacked."

Clayton v. *Wilton* so supported. The case of *Clayton* v. *Wilton* (*r*) may also be supported upon this ground, as the limitation to sons of a future marriage could not, in this view, be supported without supporting the subsequent limitation to the daughters of the first marriage.

The same principle seems to have been followed by Lord Hardwicke in *Newstead* v. *Searles* (*s*).

So, too, in Ireland, in the case of *Stackpoole* v. *Stackpoole* (*t*) it was laid down by lord St. Leonards, then Sir Edward Sugden, Lord Chancellor of Ireland: "As a general rule they (remainders to collaterals) are voluntary, unless there be some limitation subsequent to them within the consideration which must be supported."

The same principle has also been recently followed in the Irish case of *In re Sheridan* (*u*), where a limitation to a brother coming between two limitations within the consideration of marriage was upheld.

(*p*) 2 Wils. 356; post, p. 362; 2 Wils. 3rd ed. 358, n.; Sug. V. & P. 14th ed. 716, n. 1.

(*q*) 27 Eliz. c. 4.

(*r*) Supra, pp. 353, 354; and see comments of Lord St. Leonards, V. & P. 14th ed. 716, n. 1; Hall, V. C., in *Price* v. *Jenkins*, 4 Ch. D. 489; Lord Selborne, L.C., in *Mackie* v. *Herbertson*, 9 App. Cas. 337; and Dart, V. & P. 5th ed. 897, 899.

(*s*) 1 Atk. 267; supra, p. 346; see comments of Hall, V.C., in *Price* v. *Jenkins*, 4 Ch. D. 488.

(*t*) 2 Con. & Law. 502. (*u*) 1 L. R. Ir. 54.

It is conceived, however, that the true view in this case also is * that such limitations are not [* 356] within the marriage consideration, and that the real question is, upon the construction of each particular settlement, is there or is there not a bargain, whether between husband and wife, or between one or both of them any other person or persons, as to these limitations? (*v*)

The particular limitation a matter of bargain.

This view appears to be borne out by the most recent cases, and many of the older cases can be so supported.

Jenkins v. *Keymis* (*w*) was explained by Hall, V.C., in *Price* v. *Jenkins* (*x*) as a bargain between father and son which supported the limitations in favour of the issue of the son by *any* marriage.

Clayton v. *Wilton* (*y*) was so treated by Blackburn, J., in *Clarke* v. *Wright* (*z*). Blackburn, J., held that the limitations in *Clarke* v. *Wright* (*z*) were made part of the marriage contract, part of the reciprocal considerations between husband and wife, and were not voluntary (*z*). This view was followed by Hall, V.C., in *Price* v. *Jenkins* (*a*).

In Ireland, in *In re Cullen's Estate* (*b*), a man on marriage settled his real estate, after limitations within the marriage consideration, to the use of his sons of the intended marriage in tail male, and, in default of issue male, to the use of his daughters as tenants in common in fee. It was laid down that the question was whether this limitation to daughters of a *future* marriage had or had not been the subject of a stipulation, and that, as such stipulation did not appear, the daughters were volunteers.

In *Wollaston* v. *Tribe* (*c*) a limitation to children of *any future* marriage in a settlement by a woman was said by Lord Romilly, M.R., to be not within the consideration of marriage, and purely voluntary.

(*v*) Sweet, Conv. 2nd ed. 968, 969; Eversley, Dom. Rel. 165.
(*w*) 1 Lev. 153, Hard. 295; and see *Den* v. *Ogle*, Lofft, 216, and *White* v. *Stringer*, 3 Keb. 322, S. C. 2 Lev. 105.
(*x*) 4 Ch. D. 486–488; supra, p. 353.
(*y*) 3 Mad. 302, n.
(*z*) 6 H. & N. 849, 859; Willes, J., concurred.
(*a*) 4 Ch. D. 483.
(*b*) 14 Ir. Ch. Rep. 506; and see *In re Sheridan*, 1 L. R. Ir. 54.
(*c*) L. R. 9 Eq. 44.

In the most recent case of *Mackie* v. *Herbertson* (*d*), [* 357] in the House * of Lords, the limitation was "and for behoof of the children procreated, or to be procreated, of the body of the said Mrs. Helen Campbell or Mackie," as she should appoint by writing, and in default equally among them. Lord Selborne, L.C., held that the principle of *Newstead* v. *Searles* (*e*) and *Clayton* v. *Wilton* (*f*) applied—namely, that such a limitation had been the subject of a stipulation.

Limitations in marriage contract a question of *bargain*.

It is submitted that the only way to reconcile the various contradictory decisions on this subject is to adopt the view laid down by Lord Blackburn (then Mr. Justice Blackburn), and concurred in by Willes J., in the Court of Exchequer Chamber, in *Clarke* v. *Wright* (*g*), and followed by Hall, V.C., in *Price* v. *Jenkins* (*h*).

According to the principles laid down in these cases, the real question is, what was the marriage bargain or contract? The marriage bargain is like any other mutual agreement in which there are many terms; the promise by the one party to be bound by all the terms is a consideration for the promise of the other party to be bound by all the terms, so that none of them are without consideration (*i*). The question, then, in each particular case is to determine whether the particular limitation has or has not been contracted for. Once that a particular limitation is either inferred by law or found by extrinsic evidence to have been stipulated for, that moment the limitation is included in the contract, becomes attached to the consideration, and is a limitation for value (*k*).

This view, which it is conceived would be probably now followed by the Court, seems to harmonize all the various cases on the subject.

It reduces the question to one of the construction

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d 9 App. Cas. 303; supra, p. 350.

e 1 Atk. 265.

f 3 Mad. 302, n.

g 6 H. & N. 849; Dart, V. & P. 5th ed. 893; Banning, Marriage Settlements, 2, 3.

h 4 Ch. D. 483, and see *Mackie* v. *Herbertson*, 9 App. Cas. 303; ante, pp. 350, 351.

i *Clarke* v. *Wright*, 6 H. & N. 863 per Blackburn, J.; and see *Dukes* v. *Broadmead*, 4 D. F. & J. 576.

k *Mullins* v. *Guilfoyle*, L. R. 2 Ir. C. L. 10.

of the marriage contract. The problem for solution, then, is, what was the intention of the parties to that contract?

Real question, what did parties to the marriage contract intend?

*The degree of relationship to either of the [*358] settlors of the person whose interest under the settlement is challenged in this view is only material so far as it affects the presumption that such limitation was the subject of a bargain by some or one of the parties to the contract.

That presumption will be made by the law in the case of a limitation in favour of a husband, wife, or the issue of the intended marriage (*l*).

Bargain, when inferred by law.

In *any* other case, it is conceived, the onus of proving that the particular limitation was the subject of a bargain rests with the person who seeks to uphold that limitation as made for value.

When bargain must be proved, and by whom.

This presumption will be readily made in the following classes of cases :—

Presumption readily made:

Whenever the limitation has been created in favour of a person who is *not* a relation of the grantor of that limitation, it will readily be inferred to have been the result of a bargain (*m*).

1. If limitation to a person *not* a relation of grantor.

So if a limitation is created in favour of the collateral relations of the party to whom the property does *not* belong, it may well be presumed that such party stipulated, as part of the marriage bargain, for its insertion into the settlement, and so that party may be properly regarded as having purchased it on behalf of those who are to be benefited thereby (*m*). The reason for this presumption being made is that, without it, the appearance of such a limitation in the settlement is difficult to account for.

This presumption may be also made if the person in favour of whom such limitation is created is an absolute stranger in blood to the person to whom the property does *not* belong (*n*) ; for the difficulty of otherwise ac-

(*l*) Ante, p. 342 ; *Mackie* v. *Herbertson*, 9 App. Cas. 337 ; and see *In re D'Angibau*, 15 Ch. D. 242 ; Sweet, Conv. 2nd ed. 968.

(*m*) Dart, V. & P. 5th ed. 894, 5 ; *Clarke* v. *Wright*, 6 H. & N. 877, per Williams, J. ; *In re Browne's Estate*, 13 Ir. Ch. Rep. 295 ; *Mullins* v. *Guilfoyle*, L. R. 2 Ir. C. L. 101.

(*n*) *Clarke* v. *Wright*, 6 H. & N. 863, per Blackburn, J.

counting for the limitation in the settlement seems just as great in this case as if the limitation was in favour of a collateral relation.

2. When *wife* is settlor and limitation in favour of *her* collateral relotions.

[* 359] *It has been considered that this presumption may be also made where the intended *wife* is the settlor, and the limitation which it is sought to support as made for value is one in favour of *her* collateral relations.

Two reasons have been assigned for this presumption. One is that a limitation in favour of the wife's collateral relations so far derogates from the husband's marital rights that a special stipulation by the intended wife on behalf of her collateral relations may be fairly presumed—so as to have made her a purchaser of that limitation (*o*).

The other reason is, that as a woman, by reason of the disability of marriage, could not make any provision for her collateral relations during her husband's life, so she might fairly be presumed to have stipulated for the limitation in their favour upon a settlement of her own property on her marriage (*p*), and in this way to have purchased the limitation.

Effect of Married Women's Property Act, 1882.

The Married Women's Property Act, 1882, has, however, greatly lessened the importance of this presumption where the intended *wife* is the settlor, by enabling a woman married after 1882 to hold all her property, both real and personal, as her separate property, independently of her husband (*q*). The husband has now no possible interest in, or right over, his intended wife's personal property with which he can bargain; so that the class of cases in which this presumption may be applied becomes limited to those in which the intended wife is the settlor of *real* property, and to which the right to curtesy could attach (*r*).

This presumption may also, it is conceived, be raised

(*o*) Dart, V. & P. 5th ed. 894; *In re Cullen's Estate*, 14 Ir. Ch. Rep. 510; *Gale* v. *Gale*, 6 Ch. D. 144; and see *Ithell* v. *Beane*, 1 Ves. 215, commented on in *Price* v. *Jenkins*, 4 Ch. D. 489, 490.

(*p*) *Clarke* v. *Wright*, 6 H. & N. 849; *In re Cullen's Estate*, 14 Ir. Ch. Rep. 510.

(*q*) 45 & 46 Vict. c. 75, ss. 1 (1), 2.

(*r*) But see *Shurmur* v. *Sedgwick*, 24 Ch. D. 597; *In re Cullen's Estate*, 14 Ir. Ch. Rep. 510; ante, pp. 292, 295. See also Griffith, 5th ed. pp. 10, 59.

in a certain limited class of cases where the limitation is in favour of collateral relations of the settlor—namely, in those in which the * limitation which it [* 360] is sought to support is placed *between* two limitations, each within the consideration of marriage (*s*).

3. When limitation to collaterals of settlor is *between* two limitations to issue.

The ground of this has been said by Lord St. Leonards to be that there is a limitation subsequent to that which is sought to be supported, within the consideration, which must be supported, and that necessarily involves the support of the intermediate limitation (*t*). The Court in such cases holds the whole of the limitations to be effectual in order that it may give effect to that which, being within the consideration, must have effect given to it (*u*).

This presumption cannot, in general (*v*), be made in the following two classes of cases:—

No presumption of bargain: 1. If husband is settlor, or now if wife is settlor; and limitation to *collaterals* of settlor.

If the husband is the settlor, or, in general, if the wife is the settlor and has married since 1882; and the limitation is in favour of *collateral relations* of the settlor.

The reason for this is the same in each case—namely, that there is nothing to prevent the settlor from creating limitations in favour of collateral relations or other persons *during* his or her marriage out of property under his or her control; since the settlor is under no disability by reason of marriage (*w*); and, therefore, no presumption can be made on that ground.

And further, such a limitation is in favour of persons outside the consideration of marriage, and therefore is regarded as voluntary, unless a special bargain for its insertion can be proved. Moreover, in such a case it is difficult to see how the person to whom the property belonged can be considered to have purchased any of

(*s*) Sug. V. & P. 14th ed. 716; *In re Sheridan's Estate*, 1 L. R. Ir. 54; *Clayton* v. *Wilton*, 3 Mad. 302, n., S. C. 6 M. & S. 60; Dart, V. & P. 5th ed. 899; ante, pp. 354, 355.

(*t*) *Slackpoole* v. *Stackpoole*, 2 Con. & Law, 502; ante, p. 355.

(*u*) Per Hall, V.C., in *Price* v. *Jenkins*, 4 Ch. D. 488; and see the judgment of Lord Selborne, L.C., in *Mackie* v. *Herbertson*, 9 App. Cas. 335–337.

(*v*) Ante, pp. 358, 359.

(*w*) 45 & 46 Vict. c. 75, ss. 1 (1), 2; *In re Cullen's Estate*, 14 Ir. Ch. Rep. 510; Dart, V. & P. 5th ed. 894; *Gale* v. *Gale*, 6 Ch. D. 152, 153.

the limitations of that property on behalf of these collateral relations (*x*).

[* 361] *It will be observed that, in the various cases which establish this proposition, the limitation in favour of collateral relations of the settlor is never followed by limitation to persons within the consideration of marriage; and is frequently the ultimate limitation. The question that has always arisen is whether this limitation, and all other limitations subsequent to it, were or were not void against a creditor or subsequent purchaser for value under the statutes of Elizabeth (*y*).

2. Ultimate limitation to settlor.

Upon the same principle an ultimate limitation of the settlor's property to himself or herself has been held to be voluntary; because there was no evidence of any bargain for it, as the other party to the settlement could not have been assumed to bargain for the insertion of such a limitation (*z*).

The remoteness of a limitation to a collateral *formerly* a ground to support it.

The remoteness of a limitation to a collateral has been adduced in some old cases as an argument in favour of its validity (*a*). For this purpose *Osgood* v. *Strode* (*b*) is relied on, where all Lord Macclesfield said was, in commenting on *Jenkins* v. *Keymis* (*c*), that the limitation there "could not well be intended to have been made to cheat a creditor unless the *person making the same were then in debt;* the very remoteness of the limitation . . . . . was an evidence that such limitation was not intened to cheat creditors." It was, in fact, a case of a subsequet purchaser (a mortgagee), but Lord Macclesfield's words can

(*x*) See the judgment of Christian, J., in *In re Browne's Estate*, 13 Ir. Ch. Rep. 295; Williams, J., in *Clarke* v. *Wright*, 6 H. & N. 877; and *Heap* v. *Tonge*, 9 Hare, 104, per Turner, V.C.

(*y*) *Sutton* v. *Chetwynd*, 3 Mer. 249; Sug. Prop. Ho. Lords, 153; *Johnson* v. *Legard*, 3 Mad. 283, n., S. C. 6 M. & S. 60; *Cotterell* v. *Homer*, 13 Sim. 506; *Stackpoole* v. *Stackpoole*, 4 Dur. & War. 320; S. C. 2 Con. & Law. 489; *Kekewich* v. *Manning*, 1 De G. M. & G. 176; *In re Cullen's Estate*, 14 Ir. Ch. Rep. 502; *Smith* v. *Cherrill*, L. R. 4 Eq. 390; *Wollaston* v. *Tribe*, L. R. 9 Eq. 44; *Re D'Angibau*, 15 Ch. D. 228; *Paul* v. *Paul*, 15 Ch. D. 580, S. C. 20 Ch. D. 742.

(*z*) *Barham* v. *Earl of Clarendon*, 10 Ha. 126; *Massey* v. *Travers*, 10 Ir. C. L. Rep. 459; *In re Browne's Estate*, 13 Ir. Ch. Rep. 502; and see *Gibbs* v. *Grady*, 41 L. J. (N.S.) Ch. 163.

(*a*) Sug. V. & P. 14th ed. 716; Dart, V. & P. 5th ed. 899; and see *Staplehill* v. *Bully*, Pr. Ch. 224.

(*b*) 2 P. Wms. 245, 255.

(*c*) 1 Lev. 150, 237, Hard. 395.

only be taken to apply to subsequent creditors, as to whom even a *voluntary* limitation (without fraud) will doubtless be valid. That case can therefore hardly be said to favour the proposition that the remoteness of a limitation will make it valid against prior creditors or subsequent purchasers.

*In *White* v. *Stringer* (*d*), again, the limi- [* 362] tation being subsequent to a vested estate tail "which might endure for ever" was said to be a point in its favour; but in that case there were other reasons for holding it valid—viz., notice to the purchaser and a collateral security taken by him against this very limitation (*e*).

Limitation to collaterals after vested estate tail *formerly* supported.

A limitation in favour of collateral relations or others in a marriage settlement (which so far as the husband and wife are concerned is voluntary) may often be supported as made for value upon another ground.

Limitation in favour of collaterals good when bargain made by a *third* person.

That ground is that the bargain for the insertion of the particular limitation was made by a *third* person without whose concurrence the settlement could not have been made (*f*).

In *Roe* v. *Mitton* (*g*) this subject was fully discussed. It was thus: John Hamerton, being seised in fee of lands, settled them on his marriage with remainder, after those to the sons of the marriage, *to two of his brothers severally* and successively in tail male, remainder to the daughters of the marriage. The mother of J. H. was a party to the settlement, and it appeared that she had an annuity of £50 issuing out of the whole of the lands, and that she joined in levying a fine and executing the settlement, for the purpose of releasing part of the lands from her annuity, so that they might be settled. Lord Chief Justice Wilmot said there was a good and valuable consideration to support the limitation to the brothers; the whole of the question turned on the mother's joining in the settlement; the friends and relations of the intended wife must be supposed to say, "M. shall not

Roe v. Mitton.

(*d*) 2 Lev. 105, 3 Keb. 322; Dart, V. & P. 5th ed. 899.
(*e*) See ante, p. 186, note (*i*).
(*f*) *Heap* v. *Tonge*. 9 Hare, 90; ante, pp. 262 et seq.
(*g*) 2 Wils. 356. See 3rd ed. 358, n.; *Myddleton* v. *Kenyon*, 2 Ves. Jun. 391.

marry your son unless you will give up or take off your annuity from the whole of the lands and let it be charged upon a part thereof." The mother answers, "If you want my assistance you shall pay for it—*i. e.*, you shall limit the estate to my younger sons in preference and priority to the daughters of the marriage on failure of issue male." This is a good consideration to John the son (and the quantum is not at all material). He purchases his wife by his mother's [* 363] concurrence. To the *objection that the husband being seised in fee could have made the settlement without the mother, the answer is, that he could not have made a settlement agreeable to the lady's friends without the mother's aid (*h*).

Stephens v. *Trueman.*

In *Stephens* v. *Trueman* (*i*) a father, on the marriage of his daughter, agreed to pay down £500 to which she was not entitled till after his death; and it was also agreed that certain real estate belonging to the daughter should be settled on her and her issue, with remainder to the father and his heirs. The husband and wife died without issue. Lord Hardwicke decreed specific performance of the articles in favour of the father's heirs, on the ground that "for the precarious and remote interest limited to the father the advancing £500 by him was a sufficient consideration, although not mentioned for a consideration, but natural love and affection only; for the whole must be taken entire, the one part to influence the other."

Jones v. *Boulter.*

And where a mother joined in conveying to her son on his marriage a small estate out of which she was dowable, this was held sufficient to support a settlement of another estate of which the father was seised in fee on the father for life, *remainder to the mother for life*, remainder to the uses of the marriage (*k*).

Limitations in favour of *collaterals* supported when in family settlements.

Closely connected with these last cases is a class of cases which partakes of the nature of family settlements (*l*) as well as of ordinary marriage settlements.

This is the case where on the marriage of a son, the family estates are resettled; where the father as tenant

(*h*) See Sir R. P. Arden's comments on this case in *Brown* v. *Carter*, 5 Ves. 877–8.
(*i*) 1 Ves. 74.
(*k*) *Jones* v. *Boulter*, 1 Cox, 288.
(*l*) Ante, pp. 263 et seq.

for life and the son as tenant in tail agree to modify their respective interests in the settlement,

Limitations in favour of collateral relations of the son, one of the settlor's, are here supported, as for value, on the ground that they were the consideration for the concurrence of the father, without which the resettlement could not have been effected (*m*).

*So Lord Chief Justice Cockburn in *Clarke* [* 364] v. *Wright* (*n*) said: "The case of a father, tenant for life, who joins his son, the remainderman in tail, in a settlement on the marriage of the son, stands on an entirely different footing, and is open to very different considerations. There the co-operation of the tenant for life being necessary to the resettlement of the estate, he has a right to stipulate for what terms he pleases as the price of his concurrence; among others, for that of a provision for his other children and their issue, or the like. The consideration there is not the marriage, but the consent of the settlor to give up his existing life estate, and resettle the estate" (*n*).

(*m*) *Stackpoole* v. *Stackpoole*, 2 Con. & Law. 502; *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84, 92; *Jenkins* v. *Keymis*, 1 Lev. 150, ante, p. 345; *Osgood* v. *Strode*, 2 P. Wms. 256, ante, p. 344; *Neeve* v. *Keck*, 9 Mod. 106; Dart, V. & P. 5th ed. 898.

(*n*) 6 H. & N. 870.

* CHAPTER V.

POST-NUPTIAL SETTLEMENTS AND ANTE-NUPTIAL AGREEMENTS.

Post-nuptial settlements in general voluntary.

To settlements made *after* marriage of course the consideration of the marriage does not extend; so that, unless there are other considerations to support them, they are regarded as purely voluntary (*o*).

What considerations support them. Additional portion.

An additional portion brought by the wife after marriage is a sufficient consideration, both as against creditors and purchasers, on which to found a post-nuptial settlement by the husband on her and her children (*p*); and in like manner an agreement by the friends of the wife to settle will be sustained, if made in consideration of a gift by the husband's friends (*q*).

On this point Lord Hardwicke said (*r*): "It is admitted, if a settlement is made before marriage, though without a portion, it would be good, for marriage itself is a consideration; and it is equally good if made after marriage, provided it be upon payment of money as a portion, or a new additional sum of money, or even an agreement to pay money, if the money be afterwards paid pursuant to the agreement; this is allowed both in law and equity to make it a good and valuable settlement."

Advance by third person.

So, also, in *Wheeler* v. *Caryl* (*s*), Lord Hardwicke laid it down as a general principle, that "If after marriage her (the wife's) father, or other person, in consideration of the husband making a settlement, advance a sum of money, such a settlement will be good and for valuable

(*o*) *Wheeler* v. *Caryl*, 1 Amb. 121; *Warden* v. *Jones*, 2 De G. & J. 76; ante, p. 342.

(*p*) *Colvile* v. *Parker*, Cro. Jac. 158, Prec. Ch. 101, 425; *Coventry* v. *Coventry*, Gilb. Rep. 160; *Jones* v. *Marsh*, Ca..t. Talb. (Forr.) 64; *Ward* v. *Shallet*, 2 Ves. 16: *Ramsden* v. *Hylton*, 2 Ves. 308; *Lanoy* v. *Athol*, 2 Atk. 444–6; *Maguire* v. *Nicholson*, Beatt. 592.

(*q*) *Brown* v. *Jones*, 1 Atk. 188; *Tweddle* v. *Atkinson*, 1 B. & S. 393.

(*r*) *Brown* v. *Jones*, 1 Atk. 190.

(*s*) 1 Amb. 121.

consideration ;" and a refusal by a trustee * to [* 366] pay the wife's money without a settlement will support the settlement (*t*).

Amount immaterial.

And, as in analogous cases, the amount of the additional portion is not material, unless the inadequacy is so great as to induce the presumption of collusion (*u*). Where the question was whether, in a settlement made after marriage, by which a very large estate was settled, and the consideration whereof was an additional portion of £100, the settlement should not be considered as voluntary, the portion being so much out of proportion to it, Lord Talbot said "he would not weigh considerations in diamond scales; that there was a moral obligation to provide for a wife and children, and he would not suffer the deed to be infected with doctrine of voluntary estates" (*v*).

Gift to wife in consideration of an annuity to her.

And an annuity granted to a wife by her husband is sufficient consideration to support as against the creditors of the wife's father a grant by him to the wife of an annuity for her sole and separate use (*u*).

Will release or disclaimer of power by married woman *now* support post-nuptial settlement?

It is an undecided point whether, under the combined effects of the Conveyancing Acts, 1881 and 1882 (*w*), and the Married Women's Property Act, 1882, a woman married after 1882, or, if married before 1882, only as to property which has accrued to her after that date, can now release, extinguish, or disclaim a power over real and personal property, except as she could have done before 1883 (*x*).

It would, however, appear that she can do so by the indirect means of contracting or covenanting not to exercise the power (*y*); and so may, in effect, release, extinguish, or disclaim it.

If such married woman can now release, extinguish,

(*t*) *Moor* v. *Rycault*, Prec. Ch. 22; *Brown* v. *Jones*, 1 Atk. 188; Sug. V. & P. 14th ed. 718; ante, pp. 296, 297.

(*u*) *Ex parte Draycott*, 2 Glyn & J. 283; ante, pp. 245, 247.

(*v*) Case cited by Wilmot, C.J., 2 Wils. 3rd ed. 358*. Probably *Jones* v. *Marsh*, Ca. t. Talb. (Forr.) 64.

(*w*) 44 & 45 Vict. c. 41, s. 52; 45 & 46 Vict. c. 39, s. 6.

(*x*) 45 & 46 Vict. c. 75. ss. 1, 2, 5, 24. Compare the use of "dispose of" in 3 & 4 Will. 4, c. 74, s. 77. Lush, H. & W. 69; Griffith, 5th ed. 28; Wolst. Conv. 3rd ed. 7; Eversley, Dom. Rel. 144–145; K. & E. Prec. 2nd ed. vol. 1. 90.

(*y*) 45 & 46 Vict. c. 75, s. 1 (2); Griffith, 5th ed. 16–17; Lush, H. & W. 69; *Isaac* v. *Hughes*, L. R. 9 Eq. 191.

[* 367] or disclaim * a power, without the concurrence of her husband, then such release, extinguishment, or disclaimer by her will no longer avail as a consideration to support a post-nuptial settlement of property by her; unless she contracts or covenants for value not to exercise that power.

Bargain between husband and wife.

A post-nuptial settlement, of real estate, might also have been supported by proof that there was a bargain for it, between husband and wife, by which they in some degree modified their existing interests (*z*).

Whether settlement by married woman *now* voluntary.

It would appear that if a woman has married after 1882, or if she has married before that date and her property, whether real or personal, has accrued to her after that date (*a*), there cannot be a bargain between her and her husband as to the property so as to support a post-nuptial settlement of real estate by her against a subsequent purchaser (*a*); or to make a settlement of real or personal property by her a settlement for value. Her husband has, under that Act, no right over or interest in her property with which he can bargain, unless it be the bare chance of acquiring her personal property on her death intestate (*b*). His right to curtesy will not, it is conceived, support such settlement against a subsequent purchaser (*c*).

Must be bonâ fide, and the consideration real.

But a post-nuptial settlement will not be made good by such considerations unless all the circumstances appear fair and free from doubt (*d*), and not merely colourable (*e*); and such a settlement by a husband must be in consideration of a sum of money to which he would not have been entitled unless he had consented to the making such a jointure; for if he make a jointure in consideration of money he was then entitled to, it is voluntary (*f*).

Scotch marriage.

A settlement made on a re-celebration in England of [* 368] a marriage * previously performed in Scot-

(*z*) *Teasdale* v. *Braithwaite*, 4 Ch. D. 85, S. C. 5 Ch. D. 630; *In re Foster and Lister*, 6 Ch. D. 67; *Shurmur* v. *Sedgwick*, 24 Ch. D. 597; ante, pp. 289 et seq.

(*a*) 45 & 46 Vict. c. 75, ss. 2, 5.

(*b*) Wolst. Con. 4th ed. 8; but see Eversley, Dom. Rel. 181–182.

(*c*) Griffith, 5th. ed. 10, 59; *Shurmur* v. *Sedgwick*, 24 Ch. D. 597; ante, pp. 292, 295.

(*d*) *Ward* v. *Shallet*, 2 Ves. 16.

(*e*) *Russel* v. *Hammond*, 1 Atk. 16; *In re Pearson*, 3 Ch. D., 807.

(*f*) Per Lord King in *Gardiner* v. *Painter*, Sel. Ca. Ch. 65.

land according to the Scotch law, is post-nuptial and not supported by the marriage consideration (*g*).

The "moral obligation" of providing for wife and children by settlement.

It has frequently been said that for a man to make a settlement on his wife and children is the performance of a moral obligation (*h*). It might be thought, however, that, unless it be made for providing against unforeseen and unavoidable accidents, a man would perform his duty to his family more effectively and conscientiously by so living as to avoid becoming embarrassed and getting his property encumbered by debts, than by placing the property out of the reach of creditors, so as in some measure to shield from his family the effects of his own extravagance (*i*).

In favour of whom is a post-nuptial settlement made for value treated as such?

When a post-nuptial settlement is made on the valuable consideration that the husband has given up an estate he had in his wife's property, a question may arise, in favour of whom can this settlement be treated as for value?

Of course it will treated as for value in favour of the husband or wife.

As it is not supported by the consideration of marriage, it will be considered as voluntary so far as relates either to then existing or to the future children of the husband and wife (*k*)

Post-nuptial settlements founded on agreements in writing before marriage when for value.

Although a post-nuptial settlement is of itself voluntary, an agreement reduced to writing before marriage is a contract on valuable consideration, and as such can be enforced in equity (*l*).

Post-nuptial settlements, therefore, made in pursuance of and in accordance with such agreements are as valid as if made before the marriage took effect (*m*),

(*g*) *Ex parte Hall*, 1 V. & B. 112. And see *Dobbyn* v. *Adams*, 7 Ir. Ch. 193; *Adams* v. *Adams*, 8 Ir. Ch. 41.

(*h*) Sug. Pow. 8th ed. 649; see *Ellis* v. *Nimmo*, Ll. & G. t. Sugd. 333; *Holloway* v. *Headington*, 8 Sim. 324; *Moore* v. *Crofton* 3 J. & Lat. 438.

(*i*) See *Taylor* v. *Jones*, 2 Atk. 600.

(*k*) *Green* v. *Paterson*, 32 Ch. D. 95.

(*l*) *Goring* v. *Nash*, 3 Atk. 186; *Bold* v. *Hutchinson*, 5 De G. M. & G. 558.

(*m*) *Ralph Bovey's Case*, 1 Vent. 193; *Randall* v. *Morgan*, 12 Ves. 74 Sug. H. L. 53; *Battersbee* v. *Farrington*, 1 Sw. 106, 1 Wils. Ch. 88; *Dewey* v. *Bayntun*, 6 East, 257; *Rock* v. *Dade*, MS. 1709, post, Appendix No. XIII.

even although the settlement contained no recital, nor any notice of the ante-nuptial agreement (*n*); but [* 369] * a settlement not in pursuance of the articles is voluntary (*o*). But where the agreement was by the husband to make a jointure settlement on his wife (without any mention of issue), and a settlement was made on the husband for life, remainder to wife for life, remainder to their first and other sons, it was held that the settlement, though not exactly in accordance with the articles, was not voluntary or fraudulent against creditors (*p*).

So also in a case (*q*) in Ireland before Lord Manners, where a bond was given by a husband on his marriage, and conditioned to be void on his settling lands of £100 a year in value, and he subsequently settled lands of much greater value, it was held that the settlement was good against creditors, on the principle that the Court will not, if the consideration be valuable, closely scrutinize its adequacy.

Referring to this, Lord Hardwicke made use of the expression that "articles are in Chancery considered as minutes only, and the settlement may afterwards explain more at large the meaning of the parties" (*r*).

Agreement must be binding.

The agreement before marriage must be such as a Court of equity could have enforced; so that instructions for a settlement taken down in writing from all the intended parties to the settlement by a lawyer, but not signed, will not be sufficient (*s*); but a letter from a solicitor of one party stating what he intends to do may be binding on that party (*t*).

An ante-nuptial agreement by a man to make a set-

(*n*) *Ferrars* v. *Cherry*, 2 Vern. 384.

(*o*) *Senhouse* v. *Earle*, 1 Amb. 285–8. See also *Partyn* v. *Roberts*, 1 Amb. 314; *Legg* v. *Goldwire*, Ca. t. Talb. (Forr.) 20; *Jason* v. *Jervis*, 1 Vern. 284–286; *Doe* v. *Rowe*, 4 Bing. N. C. 737; *Gates* v. *Fabin*, 19 W. R. 61.

(*p*) *Brunsden* v. *Stratton*, Prec. Ch. 520; and see *Maguire* v. *Nicholson*, Beatty, C. C. 592.

(*q*) *Maguire* v. *Nicholson*, Beatty, C. C. 592.

(*r*) In *Blandford* v. *Marlborough*, 2 Atk. 545.

(*s*) *Bawdes* v. *Amhurst*, Prec. Ch. 402; *Brownsmith* v. *Gilborne*, 2 Stra. 738; *Ayliffe* v. *Tracy*, 2 P. Wms. 65; *Warden* v. *Jones*, 2 De G. & J. 76. And see *Suffolk* v. *Greenvill*, Nels. 15–16, in which a verbal agreement (before the Statute of Frauds), not being properly established, was held of no avail.

(*t*) *Walford* v. *Gray*, 11 Jur. (N.S.) 437.

tlement on his wife was enforced, although the letters which contained the agreement were lost, such loss having been proved unforeseen and unavoidable (*u*).

*In *Trowell* v. *Shenton* (*v*) an infant, engaged [* 370] to be married, by letter promised to give seven specified houses to his intended wife. He married her after he came of age. Twelve years after, he settled these houses and two others, by a deed not referring to the letter, upon trust for her for life for her separate use, with remainder to him for life, and ultimate remainder as she should appoint, and in default to her in fee. He afterwards contracted to sell three of the houses. *Trowell* v. *Shenton.*

It was held that the settlement was voluntary, because there was no ratification of it, either by express or implied reference to the agreement by the infant after coming of age, as required by Lord Tenderden's Act (*w*).

There can be no doubt that a post-nuptial settlement proved to have been made in pursuance of and in accordance with a *parol* agreement before marriage, would not have been voluntary under either of these statutes of Elizabeth *before* the Statute of Frauds (*x*). Post-nuptial settlements founded on ante-nuptial *parol* agreements *before* Statute of Frauds.

Griffin v. *Stanhope* (*y*) is the first reported case. There Sir R. Griffin, before his marriage with Lady Stowell, promised "to assure to her £1000 per annum for her jointure, his estate being then worth £12,000 per annum; wherefore she, reposing confidence in his promise, married with him before any assurance or covenant in writing whatsoever." After the marriag the husband conveyed lands to trustees, on trusts for the benefit of his wife for 100 years, with a condition that the term should cease and be void on a juncture of £1000 per annum being settled on her, and "the Court held," as to the point we are considering, "that this lease being made in pursuance of the first promise, although there was not any mention of any lease to be made, yet it was grounded on good consideration and not fraudulent."

(*u*) *Gilchrist* v. *Herbert*, 20 W. R 348; but see *Vincent* v. *Vincent*, Times Rep. (1886), 814.
(*v*) 8 Ch. D. 318.
(*w*) 9 Geo. 4, c. 14, s. 5.
(*x*) 29 Car. 2, c. 3.
(*y*) Cro. Jac. 454.

Bovy's Case.

And the second resolution in *Sir Ralph Bovy's Case* (*z*) was, "That the settlement, being made in pursuance of articles made precedent to the marriage, had not the least colour of fraud whereby a purchaser [* 371] might avoid it; and if there had been but *a verbal agreement for such a settlement it would have served the turn." So where (*a*) it was proved that an infant had, on his marriage, made a promise to settle his estate when he came to age upon himself and his issue, this was held a sufficient consideration to avoid fraud, though, being an infant, he was not by law compellable to perform such a promise.

Statute of Frauds, sect. 4.

Shortly after this the Statute of Frauds (*b*) was passed, which, by the 4th section, enacts that "no action shall be brought . . . . whereby to charge any person upon any agreement made upon consideration of marriage, ... unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

Post-nuptial settlements founded on ante-nuptial *parol* agreements *since* Statute of Frauds.

The law with respect to post-nuptial settlements founded on parol agreements before marriage, by this statute was materially altered; and the chief question to be considered in cases arising subsequently is, whether an ante-nuptial parol promise can, by any transactions after marriage, be taken out of the Statute of Frauds.

If the post-nuptial settlement is within the provisions of that statute it becomes (in the absence of consideration other than the past consideration of the marriage already solemnized) a mere voluntary settlement, and as such voidable under the statutes of Elizabeth (*c*).

It is clear from the foregoing cases that, apart from the Statute of Frauds, such a settlement will be good against creditors or purchasers if the parol agreement is clearly proved.

It is a well-settled doctrine in equity that a part per-

(*z*) 1 Vent. 194.

(*a*) *Lavender* v. *Blackstone*, 3 Keb. 526. And see *White* v. *Drake*, 3 Keb. 6; but see now *Trowell* v. *Shenton*, 8 Ch. D. 318, supra, p. 370.

(*b*) 29 Car. 2, c. 3.

(*c*) *Loeffes* v. *Lewen*, Prec. Ch. 370. See ante, p. 365; post, pt. v. ch. iv.

formance of a verbal contract by one of the parties to it may exclude the operation of the Statute of Frauds and enable the Court to enforce specific performance of a verbal agreement (*d*). Does doctrine of part performance?

A settlement executed when its execution [372] could have been compelled is no longer voluntary or fraudulent under the statutes of Elizabeth (*e*).

Are there, then, any circumstances under which this doctrine will apply to these parol agreements before marriage? apply to parol ante-nuptial agreement?

Marriage alone, it has been frequently determined, is not a part performance of such an agreement, made in consideration of it (*f*). Thus, it was argued in *Montacute* v. *Maxwell* (*g*), and allowed by Lord Chancellor Parker, that "it was very wrong to call marriage the execution of the promise, when, until the marriage, it was not within the statute; and the statute makes the promise in consideration of marriage void; therefore, to say that the marriage was an execution which should render the promise good was quite frustrating the statute." In *Dundas* v. *Dutens* (*h*) Lord Thurlow said: "If there is parol agreement for a settlement on marriage, after marriage a suit upon the ground of part performance would not do, because the statute is expressed in that manner." Marriage alone is not a part performance.

And in *Lassence* v. *Tierney* (*i*) Lord Cottenham said that marriage is no part performance of the contract; if it were, there would be an end of the statute, and every parol contract followed by marriage would be binding.

So in *Caton* v. *Caton* (*k*) it was said by Lord Cranworth, L.C.: "That marriage in itself is no part performance within the rule of equity is certain. Marriage

(*d*) *Potter* v. *Potter*, 1 Ves. 441; Fry, Sp. Pf. 2nd ed. 252–3 et seq.
(*e*) Ante, p. 249.
(*f*) *Taylor* v. *Beech*, 1 Ves. 297; *Spicer* v. *Spicer*, 24 Beav. 365; *Bawdes* v. *Amhurst*, Prec. Ch. 402. See also *Hammersley* v. *De Biel*, 12 Cl. & F. 45; *Surcome* v. *Pinniger*, 3 De G. M. & G. 571; *Warden* v. *Jones*, 23 Beav. 496, S. C. 2 De G. & J. 76, 84; *Caton* v. *Caton*, L. R. 1 Ch. 137, S. C. L. R. 2 H. L. 127; *Trowell* v. *Shenton*, 8 Ch. D. 324, 326.
(*g*) 1 P. Wms. 618.
(*h*) 1 Ves. 199.
(*i*) 1 Mac. & G. 551, 571–2.
(*k*) L. R. 1 Ch. 137, S. C. L. R. 2 H. L. 127.

is necessary in order to bring a case within the statute, and to hold that it also takes the case out of the statute would be a palpable absurdity."

But other acts may be.

But though marriage alone is not a part performance of a verbal promise, any acts or transactions which, apart from the question of the marriage, would suffice [* 373] to uphold the contract on the ground *of part performance, will not be the less effective because marriage has intervened (*l*).

Thus in *Warden* v. *Jones* (*m*) Lord Cranworth, L. C., said: "It was hardly argued that marriage was a part performance. That is clearly not so. Where, indeed, one of the contracting parties agrees, as the consideration for the marriage, to do something more than marry, as to settle an estate, and in consideration of that promise the other party, either acting for her or him, contracts to make a settlement, then the settlement made by the one contracting party is a good act of part performance." And in support of this his Lordship referred to *Hammersley* v. *De Biel* (*n*), where an agreement having been entered into by a lady's friends on her marriage, and reduced to writing but not signed, the execution by the husband of a settlement after marriage, in accordance with the agreement, was held by Lord Cottenham, L.C. (*o*), to be an act of part performance; and on appeal the application of the Statute of Frauds was held excluded on the same grounds (*n*).

Surcome v. *Pinniger.*

In *Surcome* v. *Pinniger* (*p*) a father on the marriage of his daughter made a verbal promise to the intended husband to give them a certain leasehold house, &c., on their marriage, on the faith of which promise the husband married, and after the marriage his father-in-law gave him possession of the property, directed the tenants to pay him the rent, and handed over the title deeds; the husband expended a considerable sum of money in repairing the property, and the father died.

The property having been sold under the Lands Clauses Act (*q*), the question was, whether the pur-

(*l*) Fry, Sp. Pf. 2nd ed. 267, 268.
(*m*) 2 De G. & J. 76.
(*n*) 12 Cl. & F. 45.
(*o*) 12 Cl. & F. 61, n.; and see *Goldicutt* v. *Townsend*, 28 Beav. 445.
(*p*) 3 De G. M. & G. 571; *Cooper* v. *Wormald*, 27 Beav. 266.
(*q*) 8 & 9 Vict. c. 18.

chase-money belonged to the husband or to his father-in-law's estate; and the promise being proved it was held that there was a part performance of it independently of the marriage which would take the case out of the statute.

Ungley v. *Ungley*.

In the case of *Ungley* v. *Ungley* (*r*) a father, in consideration of the marriage of his daughter, verbally promised his intended *son-in-law to give [* 374] his daughter a particular leasehold house on her marriage as a wedding present. Immediately after the marriage the father put his daughter and son-in-law into possession, and they remained in possession till his death. The father after the marriage up to his death duly paid all instalments in respect of a mortgage on the house in favour of a building society as they fell due; and the son-in-law paid the ground-rent, rates, and taxes. On a claim to the house by the father's administrator, it was held by the Court of Appeal that the possession by the son-in-law and daughter in pursuance of the parol contract took the case out of the Statute of Frauds.

Part performance *not* by party to be charged.

But part performance *by the party to be charged* will not do (*s*).

"The ground on which the Court holds that part performance takes a contract out of the purview of the Statute of Frauds is, that when one of two contracting parties has been induced or allowed by the other to alter his position on the faith of the contract, as for instance by taking possession of land and expending money in building or other like acts, then it would be a fraud in the other party to set up the legal invalidity of the contract on the faith of which he induced or allowed the person contracting with him to act and expend his money" (*t*). So it was held that a will made in pursuance of a parol agreement before marriage to do so, is no part performance (*u*).

Ordinary rules apply when parties are married.

It appears then, that, so far as the doctrine of part performance is concerned, parol agreements in consid-

(*r*) 4 Ch. D. 73, S. C. 5 Ch. D. 887; and see *Alderson* v. *Maddison*, 7 Q. B. D. 174, 180.

(*s Caton* v. *Caton*, L. R. 1 Ch. at p. 148.

(*t*) Per Lord Cranworth, in *Caton* v. *Caton*, L. R. 1 Ch. 137, S. C. L. R. 2 H. L 127.

(*u*) S. C.; and see *Humphreys* v. *Green*, 10 Q. B. D. 148.

eration of marriage become, *after* marriage, subject to the same rules (*v*) as other parol agreements on valuable consideration unconnected with marriage.

In order to set up an agreement by taking advantage of acts of part performance, the agreement must be of such a nature that the Court would have had jurisdiction in [* 375] respect of it if it had been* in writing (*w*). For instance, it is clear that there can no more be a part performance of a parol agreement which is incomplete, where marriage is the consideration, than in other cases (*x*).

Can post-nuptial settlement set up *parol* ante-nuptial agreement?

The question, whether a post-nuptial settlement, or a signed note or memorandum in writing, will support a *parol* ante-nuptial agreement, so as take it out of the Statute of Frauds (and therefore, as a settlement for value, make that post-nuptial settlement good against creditors or subsequent purchasers), is one of some difficulty.

On this point there has been a considerable conflict of judicial opinion, from the time of the passing of the statute down to a very recent period.

In the very early cases (*y*) on the subject, which, with the exception of *Moore* v. *Hart* (*z*), related to personal estate, it has been held that a signed written admission after marriage took a parol agreement before marriage out of the statute, and therefore supported the post-nuptial settlement against creditors or subsequent purchasers.

Montacute v. *Maxwell.*

In the case of *Montacute* v. *Maxwell* (*a*), a husband before marriage promised his intended wife that she should enjoy all her own estate (a considerable personal estate) to her separate use, but delayed executing any settlement till after the marriage, when, on her

(*v*) Fry, Sp. Pf. 2nd ed. 252 et seq.

(*w*) Fry, Sp. Pf. 2nd ed. 257, 258; and see *Alderson* v. *Maddison*, 7 Q. B. D. 174; *Humphreys* v. *Green*, 10 Q. B. D. 148.

(*x*) *Thynne* v. *Glengall* 2 H. L. C. 131, 156–8; *Suffolk* v. *Greenvill*, Nels. 15–16; *Spurgeon* v. *Collier*, 1 Eden, 55; post, p. 376.

(*y*) *Gale* v. *Lindo*, 4 Vern. 475; *Bird* v. *Blosse*, 2 Vent. 361; *Cokes* v. *Mascal*, 2 Vern. 34; *Wankford* v. *Fotherley*, 2 Vern. 322, *Hodgson* v. *Hutchenson*, 5 Vin. Abr. 522, pl. 84; Anon. Prec. Ch. 101.

(*z*) 1 Vern. 110.

(*a*) 1 P. Wms. 618. In *L'Estrange* v. *Robinson*, 1 Hog. Ir. Rep. 202, this case was said to be one of gross fraud.

pressing him by letter to fulfil his promise, he wrote in answer, declaring in general terms that it was reasonable that she should have the disposal of her own estate and that it should be at her command. It was decided in the wife's favour, and partly, it seems, on the ground of fraud. Lord Chancellor Parker, in the course of his judgment, said: "When it stood purely on the parol promise before marriage, there was no colour to relieve the plaintiff. But such parol promise on *marriage is sufficient consideration to [* 376] support a settlement made agreeable to it after marriage. This has been frequently determined. So it is also sufficient consideration to establish a promise made in writing after marriage. Now here is great evidence of such a promise made in writing after marriage" (*b*).

Spurgeon v. *Collier* (*c*) is the first case upon real estate since the Statute of Frauds (*d*). In that case, shortly after the marriage a settlement of real estate was made by an uncle in favour of his niece and her husband and the issue, in consideration of the marriage had. Lord Northington said: "The deed, on the face of it, is merely voluntary, for it is after marriage and on no new consideration paid. But it is said that it was made in consideration of an agreement with the husband before marriage by parol, and that, though a parol agreement will not support a suit since the Statute of Frauds, it will operate so as to make a subsequent settlement in consequence thereof to proceed on a valuable consideration. . . . . In the first place, here is no agreement or promise proved. It is admitted that since the statute, though such promise was made, Dr. A. could have no remedy. Then the settlement was voluntary, for it could not be compelled. . . . . But if *such* a parol agreement were to be allowed to give effect to a subsequent settlement it would be the most dangerous breach of the statute and a violent blow to credit. For any man on the marriage of a relation might make such promise, of which an execution never could be compelled against the promisor, and the moment his circumstances failed he would execute a settlement pursuant to his promise and defraud all his creditors."

Spurgeon v. *Collier.*

Parol agreement not proved.

(*b*) See *Taylor* v. *Beech*, 1 Ves. 297.
(*c*) 1 Eden, 155, (A.D. 1758).
(*d*) But see *Moore* v. *Hart*, 1 Vern. 201.

Such a settlement as that here suggested would clearly (apart from the question whether it would be for valuable consideration or not) be so evident a contrivance for fraudulent purposes that the Court would hold it void against creditors under the statute of 13 Eliz. c. 5; for voluntariness is only one of the badges of fraud, and a disposition of property, even for valuable consideration, can be set aside if it is fraudulent in effect (*e*).

[* 377] This case, however, is not an actual decision upon the point, for the parol agreement was not such as would, if it had been in writing, have been executed, and the post-nuptial settlement was not in pursuance of an agreement before marriage (*f*).

Dundas v. *Dutens.*

In *Dundas* v. *Dutens* (*g*), which was the leading case and an express decision on the point, the case was thus: Harriet Dutens, who was entitled under her father's will to certain moneys and other personal property, as her share in the residue of his property, some of it being still outstanding, married J. C. Just a year after the marriage an indenture was executed between the husband and wife, the executors of the father's will, and others, as trustees, by which, after reciting the particulars of Harriet Dutens' fortune and that part of the residue was still uncollected, and reciting the marriage, and that previously thereto it had been agreed between the parties that Harriet Dutens' fortune should be settled to the several uses and purposes therein mentioned, the whole of the said property was settled upon trust to pay £100 a year to the wife's separate use for her life, the remainder of the income during her life to the husband for life, then to the wife for life, and to pay the principal on the death of the survivor of them to their children.

Lord Thurlow, L. C., said (*h*) "he could not conceive that a settlement made after marriage in pursuance of an agreement before marriage, though only parol, could ever be reckoned a fraudulent settlement;

(*e*) Ante, pp. 85, 86.

(*f*) 1 Eden, 55, 61, 63; but see Throop, Verb. Ag. (Amer.), 718.

(*g*) 2 Cox, 235, 1 Ves. Jun. 199. See *Shaw* v. *Jakeman*, 4 East, 207, 1 Eden, 2nd ed. 62, n. This case is differently reported in 1 Ves. Jun. 199; the version of Cox, as counsel for the plaintiff, is probably the more accurate. In *L'Estrange* v. *Robinson*, 1 Hog. 202, it is called a case of gross fraud.

(*h*) 2 Cox, 240.

that the cases, though they had gone a great way in treating settlements after marriage as fraudulent, had never gone to such a length as that; and he was therefore clearly of opinion that the settlement was in itself valid."

These, according to Cox, were the grounds of the decision; but according to the other report (*i*) the decree was chiefly founded on the fact that the property was stock and choses in *action which could not be taken [* 378] in execution by creditors, and therefore a settlement of it could not effect their rights. But there is a circumstance which, in Lord Thurlow's mind, may have given great force to the recital—viz., that there was a combination between the creditors and the husband against the child of the marriage, so that the recital in the settlement, to which the husband was a party, in a fact which it had now become his interest to dispute was a strong proof of the truth of that recital, and might be looked on as binding him by estoppel (*k*).

The value of this case as an authority upon the point is greatly lessened by the facts that the decision could be supported on other grounds; and that the two reports of it differ so greatly.

Randall v. *Morgan*.

Sir W. Grant, in his judgment in *Randall* v. *Morgan* (*l*)—a settlement of personalty—expressed an opinion contrary to that above stated as Lord Thurlow's. In the course of his judgment he said: "There are dicta that a settlement after marriage reciting a parol agreement before marriage is not fraudulent against creditors, provided the parol agreement had actual existence. But I do not know that the point has been directly decided. It was discussed in *Dundas* v. *Dutens* (*m*), but Lord Thurlow, though inclined that it should stand good, said it was a mere matter of curiosity if the first point was against the plaintiff; as it was." The other report, however (*n*), shews that the decision

(*i*) 1 Ves. Jun. 198.

(*k*) Recitals in a deed are generally conclusive evidence against parties to the deed. *Marchioness of Annandale* v. *Harris*, 2 P. Wms. 432; *Battersbee* v. *Farrington*, 1 Sw. 113, post, p. 383; *Lainson* v. *Tremere*, 1 Ad. & E. 792; *Carpenter* v. *Buller*, 8 M. & W. 209; see post, pp. 383, 384.

(*l*) 12 Ves. Jun. 67. Sir W. Grant had only the report of Vesey before him; that of Cox was not then published.

(*m*) 2 Cox, 240, 1 Ves. Jun. 198.

(*n*) 2 Cox, 235.

rested chiefly on the fact that the settlement, being made in pursuance of an agreement before marriage, though only parol, could not be considered as fraudulent, independently of the other point against the plaintiff; and this cannot be said to be overruled by the above dictum of Sir W. Grant (*o*).

De Beil v. *Thompson.*

It has been held by Lord Langdale, M.R., in *De* [* 379] *Beil* v. * *Thompson* (*p*), and by Lord Cottenham, L.C., in the same case on appeal (*q*), that a written memorandum made after the marriage of a parol agreement entered into before the marriage would be sufficient within the statue (*r*).

Lord Cottenham, L.C., however, in the Appeal Court, pointed out that the case did not rest solely on that ground, for that there was in the dealing between the parties an important act by the intended husband, in execution of the proposed arrangement, which amounted to part performance (*s*). In the House of Lords the defence on the ground of the Statute of Frauds was abandoned, and therefore, it is thought, the case on that point, at the best, can only carry with it the authority of the Court of Appeal; and in that Court the case was, to some extent, regarded as one of part performance (*t*), and from the report, Lord Cottenham, L.C., seems to have merely intimated his opinion in favour of supporting a parol agreement by a subsequent promise in writing.

Barkworth v. *Young.*

This view was also followed in *Barkworth* v. *Young* (*u*) by Sir R. T. Kindersley, V.C., who, after carefully reviewing the authorities, said that all these opinions must, he thought, outweigh Sir W. Grant's doubts. In that case the plaintiff, G. B., a husband, on the death of his father-in-law, attempted to enforce against the father-in-law's estate a parol promise made by him on the marriage of his daughter with the plaintiff; and, in order to take that contract out of the statute, alleged a

(*o*) See *Ramsden* v. *Hylton*, 2 Ves. 304.
(*p*) 3 Beav. 469.
(*q*) Sub nom. *Hammersley* v. *De Biel*, 12 Cl. & F. 64, n.
(*r*) Per Kindersley, V.C., *Barkworth* v. *Young*, 4 Drew. 12.
(*s*) 12 Cl. & F. 63, 64 (n.), 79, 80, 87; but see Fry, Sp. Pf. 2nd ed. 244, 251.
(*t*) Supra, p. 373.
(*u*) 4 Drew. 1; and see the extra-judicial opinion of Turner, L.J., in *Surcome* v. *Pinniger*, 3 De G. M. & G. 571; but see the comments of Lord Romilly, M.R., on these two cases in *Goldicutt* v. *Townshend*, 28 Beav. 451, 452.

statement made and sworn to by the father-in-law in an affidavit in a previous suit, in which he deposed that he had said before the marriage, "There will be no money for you now, but at my death she (meaning my late daughter, Mrs. G. B.) shall share with the rest of my children." The Vice Chancellor considered this sufficient to uphold the agreement as ante nuptial, and to take it out of the Statute of Frauds (*v*).

*On the other hand, the case of *Warden* v. *Jones* (*w*), decided after *Barkworth* v. *Young* (*x*), in which Lord Romilly, M.R., held that a post-nuptial settlement made in accordance with an ante-nuptial parol agreement, by the husband was voluntary, and, as such, void against his creditors, was affirmed, on appeal, by Lord Cranworth (*y*). In this case, and in the subsequent one of *Goldicutt* v. *Townshend* (*z*), the post-nuptial settlement did not recite the parol ante-nuptial agreement, and therefore, it is conceived, the argument for treating it as a memorandum in writing within the statute derives no support from these cases. In the Court of Appeal, however, Lord Cranworth, L.C., though not called upon to decide the point, recorded an opinion against the validity of a recital in a post-nuptial settlement of a parol agreement before marriage. He said (*a*): "Nor are we embarrassed here by the question which has sometimes arisen—namely, that the post-nuptial settlement is recited to be made in pursuance of an ante-nuptial agreement. Lord Thurlow decided, in *Dundas* v. *Dutens* (*b*), that such a settlement is good, and on that decision I will only remark that, if it be a correct view of the law, the whole policy of the statute is defeated. It cannot be enough merely to say in writing that there was a previous parol agreement. It must be proved that there was such an agreement, and to let in such proof is precisely what the statute meant to forbid. Sir William Grant clearly thought that a written recognition after marriage of a verbal promise made before marriage would be invalid. One question in *Randall* v. *Morgan* (*c*) was, whether a letter, written by the father of the wife after the marriage, amounted to a

[*380] *Warden* v. *Jones.*

(*v*) 4 Drew. 17, 18.
(*w*) 2 De G. & J. 76.
(*x*) 4 Drew. 1.
(*y*) 23 Beav. 487.
(*z*) 28 Beav. 446.
(*a*) 2 De G. & J. 85.
(*b*) 2 Cox, 235.
(*c*) 12 Ves. 73.

promise to give a bond, or to a recognition of a previous verbal promise to do so. Sir W. Grant, after observing that if it was a promise made after marriage to give a bond, then it was a nudum pactum, goes on to say: 'Supposing, however, that this letter refers to some parol promise before the marriage. I doubt extremely whether that would be sufficient to entitle the Court to construe this into an acknowledgment of a debt, for the promise, being in itself a nullity, producing no obligation, a written recognition after the mar- [* 381] riage would give it no validity.' This *most reasonable construction of the statute is consistent with the decision of Lord Cottenham in *Lassence* v. *Tierney* (*d*), and, though the precise question does not arise in the case now before me, I have thought it right to advert to those authorities, in order that it may not be thought that I decide the present case merely on the ground that it is distinguishable from *Dundas* v. *Dutens* (*e*). I incline to think that, even if this settlement had contained a statement that it was made in pursuance of a previous ante-nuptial parol agreement, I should still have considered it, as I now consider it, void against creditors."

In the case of *Crossly* v. *Elworthy* (*f*), Malins, V.C., expressed the opinion that it was perfectly settled that a verbal promise before marriage to make a settlement added nothing to the validity of a settlement made after the marriage.

Trowell v. *Shenton.*

The most recent case on this point, and which, it is conceived, decides that a parol contract before marriage cannot so support a settlement made after marriage, is that of *Trowell* v. *Shenton* (*g*).

In that case an infant, before marriage, by letter promised to give his intended wife certain specified freehold houses. Twelve years after their marriage he made a settlement upon his wife of these houses and two others, not reciting the ante-nuptial agreement.

The case was decided by the Court of Appeal upon the ground that the contract made in infancy had never been ratified in writing by the infant after coming of

(*d*) 1 Mac. & G. 557.
(*e*) 2 Cox, 235, 1 Ves. Jun. 199.
(*f*) L. R. 12 Eq. 164.
(*g*) 8 Ch. D. 318.

age, as required by Lord Tenderden's Act, and that therefore the settlement was voluntary, and void against a subsequent purchaser for value.

But it is conceived that Sir G. Jessel, M.R., and Cotton, L.J., in the course of their judgments dealt with this question. Sir G. Jessel, M.R., said "Some observations were made during the argument as to the effect of a subsequent acknowledgement in writing of a contract, and *Barkworth* v. *Young* (*h*) was referred to in support of the contention that the settlement was for value, * though there was no ratification [* 382] till after the marriage. The answer to this is given by *Warden* v. *Jones* (*i*) which is subsequent in date *Barkworth* v. *Young* (*h*), and therefore, so far as the two are inconsistent, overrules it. Lord Cranworth, there referring to a post-nuptial settlement reciting that it was made in pursuance of an ante-nuptial agreement, says: 'Lord Thurlow decided in *Dundas* v. *Dutens* (*k*) that such a settlement is good, and on that decision I will only remark that, if it be a correct view of the law, the whole policy of the statute is defeated. It cannot be enough merely to say in writing that there was a previous parol agreement. It must be proved that there was such an agreement, and to let in such proof is precisely what the statute meant to forbid.' In that short passage the Lord Chancellor disposed of all the other authorities."

Cotton, L.J., in his judgment, pointed out that the principle upon(which *Trowell* v. *Shenton* (*l*) and *Warden* v. *Jones* (*i*) were decided is really the same. In the one case a written contract made in infancy cannot support a settlement, because Lord Tenterden's Act, which requires written satisfaction of that contract signed by the party to be charged, has not been complied with. In the other case, a parol contract made before marriage cannot be connected with a written one made after marriage so as to support it, because the Statute of Frauds, which requires some written evidence of the parol contract signed by the party to be charged, has been disregarded.

The result, then, of the English authorities on this

(*h*) 4 Drew. 1.
(*i*) 2 De G. & J. 76.
(*k*) 2 Cox, 235, 1 Ves. Jun. 199.
(*l*) 8 Ch. D. 326; but see *Ex parte Whitehead*, 14 Q. B. D. 419.

Parol ante-nuptial agreement cannot make post-nuptial settlement for value.

point seems to be that a parol agreement before marriage cannot set up a settlement made after marriage so as to make it a deed for valuable consideration, and therefore good against creditors or subsequent purchasers (*n*).

Same if recital of *parol* agreement in post-nuptial settlement.

A recital in the post nuptial settlement of an ante-nuptial parol agreement will not give it any additional validity; so that, for this question, such a deed stands on the same footing as a post-nuptial settlement without such recital.

[*383] *On principle this seems to be the sounder view. The opposite view would, in effect, override the Statute of Frauds, for it would enable a dishonest person, by a mere recital in a post-nuptial settlement, to exclude his creditors. The mere fact that it would be in the power of a person so to set up a parol ante-nuptial agreement to support a post-nuptial settlement, of which his creditors could have no knowledge, seems in itself a good argument against it (*o*).

American view the same.

The same view of this question has, after some divergence of opinion, been adopted in the United States, and is now there regarded as settled law (*p*).

Parol contract upheld when against the interest of person admiting it.

It should also be observed that the only cases in which a post-nuptial recognition has been allowed to establish the agreement are where to prove the parol contract was against the interest (in the then suit) of the person by whom the written recognition had been made (*q*). As against such persons the subsequent writing might be valid by estoppel (*r*) : a view which is

(*n*) Sug. Pow. 8th ed. 650; *Edwards* v. *Hamilton*, H. & W. 290; Fry, Sp. Pf. 2nd ed. 251; Dav. Prec. Conv. 3rd ed. vol. 3, 368; but see Dart, V. & P. 5th ed. 1028; Eversley, Dom. Rel. 161.

(*o*) *Battersbee* v. *Farrington*, 1 Sw. 113; *Spurgeon* v. *Collier*, 1 Ed. 61; Pollock, Cont. 4th ed. 615.

(*p*) *Reade* v. *Livingston*, 3 Johns. Ch. 481; Kent, Com. 12th ed. 172, 173; Story, Eq. Jur. 12th ed. s. 374; Throop, Verb. Ag. (Amer.), 716, 721, 722; Bump. Fr. Conv. (Amer.), 2nd ed. 297, 298.

(*q*) *Dundas* v. *Dutens*, 2 Cox, 235, 1 Ves. Jun. 196; *Battersbee* v. *Farrington*, 1 Sw. 106; *Montacute* v. *Maxwell*, 1 P. Wms. 618, 1 Str. 236; *Barkworth* v. *Young*, 4 Drew. 1.

(*r*) *Ford* v. *Grey*, 1 Salk. 285; *Marchioness of Annandale* v. *Harris*, 2 P. Wms. 432, affirmed by House of Lords, 1 Bro. P. C. 250; *Shelly* v. *Wright*, Willes, 11, 12; *Lainson* v. *Tremere*, 1 A. & E. 792; *Bowman* v. *Taylor*, 2 A. & E. 278; *Bowman* v. *Rostron*, 2 A. & E. 295; *Carpenter* v. *Buller*, 8 M. & W. 209; *Fort* v. *Clark*, 1 Russ. 601.

supported by the words of Sir Thomas Plumer, M.R., in *Battersbee* v. *Farrington* (*s*): "On the first question (which I am not now to decide) the distinction, I apprehend, is, that against all persons claiming under the settlement the recital is conclusive."

So in *Watts* v. *Watts* (*t*), where a post-nuptial settlement was made by a husband in favour of his wife and children, which recited that it was made in pursuance of an ante-nuptial agreement, and the husband afterwards tried to sell part of the settled property, it was held that the burden of proof lay on him to shew the settlement voluntary, and that it would be assumed, till the contrary was proved, that the recited agreement was a written one.

Parol agreement, and personal property actually transferred *before* marriage.

*It seems that if a man, upon his marriage [*384] with a lady, enters into a mere parol agreement with her that a sum of money shall be transferred to trustees upon trusts for himself, his intended wife, and the children of the marriage, and the money is, *before* the marriage, actually transferred to the trustees, who hold it solely upon the trusts agreed upon, the fact that the instrument declaring the trusts is executed by them subsequently to the marriage does not make it a voluntary instrument, or enable creditors to set it aside on the ground that it was not made bonâ fide in consideration of the marriage (*u*).

Parol representation inducing marriage.

A post-nuptial settlement may also be enforced in pursuance only of a *parol* representation made before marriage, upon the ground that the person who has made the promise is, under the circumstances, estopped from denying it (*v*).

(*s*) 1 Sw. 113; and see *Stone* v. *Stone*, L. R. 5 Ch. 74.

(*t*) 24 W. R. 489, affirmed on appeal.

(*u*) *Cooper* v. *Wormald*, 27 Beav. 266, 270; *Simmons* v. *Simmons*, 6 Hare, 352; and see *Brown* v. *Jones*, 1 Atk. 189; *Ex parte Whitehead*, 14 Q. B. D. 419. As to lands, see Statute of Frauds, s. 7.

(*v*) *Moore* v. *Hart*, 1 Vern. 201; *Hodgson* v. *Hutchenson*, 5 Vin. Abr. 522, ante, p. 375; *Bird* v. *Blosse*, 2 Vent. 361; *Cokes* v. *Muscal*, 2 Vern. 200; *Wankford* v. *Fotherly*, 2 Vern. 322; *Halfpenny* v. *Ballet*, 2 Vern. 373; *Luders* v. *Anstey*, 4 Ves. 501; *Merry* v. *Ryves*, 1 Eden, 1; *De Beil* v. *Thompson*, 3 Beav. 469, S. C. on appeal as *Hammersley* v. *De Beil*, 12 Cl. & F. 45; *Madox* v. *Nowlan*, Beatty, C. C. 632; *Loxley* v. *Heath*, 27 Beav. 523; *Prole* v. *Soady*, 2 Giff. 1; *Cooper* v. *Wormald*, 27 Beav. 266; *Williams* v. *Williams*, 37 L. J. Ch. 854; *Bold* v. *Hutchinson*, 5 De G. M. & G. 558; *Maunsell* v. *Hedges White*, 4 H. L. C. 1039; *Jorden* v. *Money*,

The fourth section of the Statute of Frauds, it must be observed, applies only to *agreements*, and does not include *representations* (*w*).

The question, then, whether a settlement can be enforced after marriage if the marriage has been induced by a *parol* representation, is one which is not affected by that section of the statute; so that this case appears as an exception to the general principle that a parol agreement before marriage cannot set up a post-nuptial settlement so as to make it a settlement for value (*x*).

The principle upon which a *parol* representation will be so enforced has been thus stated by Lord Selborne, L.C., in *Citizens' Bank of Louisiana* v. *First National* [*385] *Bank of New Orleans* (*y*):—*"I apprehend that nothing can be more certain than this, that the doctrine of equitable estoppel by representation is a wholly different thing from contract, or promise, or equitable assignment, or anything of that sort. The foundation of that doctrine, which is a very important one, and certainly not one likely to be departed from, is this: that if a man dealing with another for value makes statements to him as to existing facts which, being stated, would affect the contract, and without reliance upon which, or without the statement of which, the party would not enter into the contract, and which, being otherwise than as they were stated, would leave the situation, after the contract, different from what it would have been if the representations had not been made; then the person making those representations shall, so far as the powers of a Court of equity extend, be treated as if the representations were true, and shall be compelled to make them good. But those must be representations concerning existing facts."

But it is not every parol representation which has induced marriage which will entitle the promisee to enforce it against the promisor.

There is a fundamental distinction between a parol

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5 H. L. C. 185. See the judgment of Stephen, J., in *Alderson* v. *Maddison*, 5 Ex. D. 293, S. C. 7 Q. B. D. 174, S. C. 8 App. Cas. 467; Pollock, Cont. 4th ed. 613–614.

(*w*) Throop, Verb. Ag. (Amer.), 675, 731.

(*x*) Dav. Prec. Conv. 3rd ed. vol. 3, 640–646; Lush, H. & W. 437–438; Kerr, Fraud & Mis. 2nd ed. 50–51.

(*y*) L. R. 6 H. L. 352, 360.

representation as to an existing fact, and as to a present revocable *intention* to do a future act (*z*). Only enforced if of an *existing fact.*

So Mellish, L.J., said: "There is a clear difference between a misrepresentation in point of fact, a representation that something exists at that moment which does not exist, and a representation that something will be done in the future. Of course, a representation that something will be done in the future cannot either be true or false at the moment it is made, and, although you may call it a representation, if it is anything, it is a contract or promise" (*z*).

It is conceived that the only parol representation (relying on which marriage has taken place) that will be enforced, is one of an *existing fact;* and that a parol representation of a present revocable *intention*, although morally binding, cannot be legally enforced (*a*).

*A post-nuptial settlement, if made by a per- [*886] son who could have been compelled to make it in order to make a good parol representation of an existing fact made before and in consideration of marriage, will, it is conceived, be valid against the creditors of, or purchasers from, the settlor (*b*).

The same principles apply to a representation made in writing to induce marriage and acted on by the person to whom it is made; but only if of an existing fact. A post-nuptial settlement so made by the maker of the written representation will, it is conceived, be upheld against his creditors or a purchaser from him (*c*). Written representation.

Of course the person who seeks to enforce the representation must prove clearly that it was made, and that the marriage took place in reliance upon it (*d*).

There seems to be no ground for making a distinction between a representation made by one of the persons to be married, and a representation made by a third person to either of them (*e*).

(*z*) *Beattie* v. *Lord Ebury*, L. R. 7 Ch. 804; *Ex parte Burrell*, 1 Ch. D. 552.

(*a*) Dav. Prec. Conv. 3d ed vol. 3, 642–646; *Alderson* v. *Maddison*, 5 Ex. D. 293, 296, S. C. 7 Q. B. D. 174, S. C. 8. App. Cas. 467.

(*b*) Ante, pp. 384, 385.

(*c*) See *Goldicutt* v. *Townsend*, 28 Beav. 445–9 et seq.

(*d*) *Jameson* v. *Stein*, 21 Beav. 5.

(*e*) *Crofton* v. *Ormsby* 2 Sch. & Lef. 583; *Warden* v. *Jones*, 23

Promise to reduce agreement to writing prevented by fraud of one party.

In any case in which the execution of an ante-nuptial settlement, or the reduction of it into writing, after a parol promise to make one has been given, is prevented by the fraud of one of the parties, that party will not be allowed to set up the Statute of Frauds (*f*). The Court will give relief to the person defrauded, just as if a binding written agreement had been duly executed (*g*), and will order specific performance of it; and such a settlement will be good against either the creditors of, or purchasers from, the settlor.

So where instructions are given and preparations made for the drawing of a marriage settlement, and, [*387] before it is completed, the *woman is drawn in, by the assurances and promises of the man to perform it, to marry him; in such a case the Court will relieve (*h*).

But no relief will be given where one of the parties is induced by the other to waive the intended settlement in reliance upon a bequest or devise of the same property (*i*).

Beav. 493, S. C. 2 De G. & J. 76; *Bold* v. *Hutchinson*, 5 De G. M. & G. 558; *Prole* v. *Soady*, 2 Giff. 1; Pollock, Cont. 4th ed. 614; and see Seton, 4th ed. 1223.

(*f*) *Cokes* v. *Mascald*, 2 Vern. 200; *Halfpenny* v. *Ballet*, 2 Vern. 373, 1 Eq. Ca. Abr. 20; and see *Taylor* v. *Beech*, 1 Ves. 297; Agnew, St. Frauds, 123.

(*g*) *Middleton* v. *Middleton*, 1 J. & W. 99; Story, Eq. Jur. 12th ed. s. 768; Fry. Sp. Pf. 2d ed. 250.

(*h*) *Maxwell* v. *Montacute*, Prec. Ch. 526; Vin. Abr. tit. Contract, H. 36.

(*i*) *Canton* v. *Canton*, L. R. 1 Ch. 137, S. C. L. R. 2 H. L. 127.

*PART V. [*389]

VOLUNTARY DISPOSITIONS OF PROPERTY INDEPENDENTLY OF THE STATUTES OF ELIZABETH; HOW VALIDLY MADE, AND IN WHAT INSTANCES THEY ARE LIABLE TO BE SET ASIDE.

CHAPTER I.

VOLUNTARY AGREEMENTS AND COVENANTS; DEFECTIVE EXECUTION OF POWERS.

Voluntary agreement not enforced by the Court.

It has been long settled that a mere gratuitously expressed intention, a promise merely voluntary, or, in other words, a *nudum pactum*, is not binding at law (*a*); and that a Court of equity will not enforce specific performance of any *agreement* unsupported by a valuable consideration (*b*). The reason of this is that an agreement or attempt to assign is, in form and nature, incomplete, and the origin of the transaction must be inquired into by the Court; and where there is no consideration, the Court, upon its general principles, *cannot* complete what it finds imperfect (*c*).

This principle of the Court to withhold its assist-

(*a*) *Heathcote* v. *Crookshanks*, 2 T. R, 27; *Kekewich* v. *Manning*, 1 De G. M. & G., per Knight Bruce, L.J., 188; *Strong* v. *Bird*, L. R. 18 Eq., per Jessel, M.R., 317.

(*b*) *Stanfield* v. *Miller*, MS. 1726, Appendix No. VIII.; Anon. case, MS., Appendix No. XII.; *Hale* v. *Lamb*, 2 Ed. 292, 294; *Ward* v. *Audland*, 8 Sim. 571, 576; *Dillon* v. *Coppin*, 4 My. & Cr. 647, 671; *Pulvertoft* v. *Pulvertoft*, 18 Ves. 90, 99; *Wycherley* v. *Wycherley*, 2 Eden, 177; *Sutton* v. *Chetwynd*, 3 Mer. 249; *Jefferys* v. *Jefferys*, Cr. & Ph. 138; *Ellison* v. *Ellison*, 6 Ves. 656; *Brownsmith* v. *Gilborne*, Stra. 738; *Ayliffe* v. *Tracy*, 2 P. Wms. 65; *Basse* v. *Gray*, 2 Vern. 692–3; *Myddleton* v. *Kenyon*, 2 Ves. Jun. 410; *Cotteen* v. *Missing*, 1 Mad. 176–83; *Ord* v. *Johnstone*, 4 W. R. 37; *Cheale* v. *Kerwood*, 6 W. R. 494; *Kennedy* v. *May*, 11 W. R. 358; *Groves* v. *Groves*, 3 Y. & J. 163; *Walrond* v. *Walrond*, Johns. 18; *Cochrane* v. *Willis*, L. R. 1 Ch. 58; *Richards* v. *Delbridge*, L. R. 18 Eq. at p. 15; Fry, Sp. Pf. 2nd ed. 42.

(*c*) *M'Fadden* v. *Jenkins*, 1 Hare, per Sir J. Wigram, V.C., 462; *Green* v. *Paterson*, 32 Ch. D., per Cotton, L.J., 105.

ance from a volunteer applies equally whatever may be [* 390] the form of the *agreement which it is sought to enforce—whether it be a contract, a covenant, or a settlement (*d*).

Whether under seal or not.

The doctrine was formerly held that, following the law, a Court of equity would enforce in favour of a volunteer a contract *under seal* (*e*). But this has been long since overruled, and is now well settled that the Court will not enforce specific performance of a *voluntary* contract or covenant, even with the legal consideration of a seal (*f*).

Consideration must be valuable.

The only consideration which will support an *agreement* so that it may be specifically enforced is a valuable one. It is not enough that the consideration is meritorous, as that of natural love and affection (*g*); and it must move from the person who seeks to enforce the agreement (*h*).

In cases of mere gift, if anything be wanting to complete the title of the donee, the Court will not assist him in obtaining it, for a mere donee can have no right to claim more than he has received (*i*), nor

(*d*) *Colyear* v. *Musgrave*, 2 Keen, 81; *Jefferys* v. *Jefferys*, Cr. & Ph., per Lord Cottenham, L.C., 141; *In re D'Angibau*, 15 Ch. D. 242, 246; *In re Anstis*, 31 Ch. D. 596. The same principle is followed in America: see Rawle, Covenants (Amer.), 4th ed. 663 et seq.

(*e*) *Wiseman* v. *Roper*, 1 Ch. Rep. 158; *Beard* v. *Nutthall*, 1 Vern. 427; *Husband* v. *Pollard*, cited *Randal* v. *Randal*, 2 P. W. 467; *Vernon* v. *Vernon*, 2 P. W. 594; *Goring* v. *Nash*, 3 Atk. 186; *Stephens* v. *Trueman*, 1 Ves. 73; and see *Williamson* v. *Codrington*, 1 Ves. 511; *Hervey* v. *Audland*, 14 Sim. 531.

(*f*) *Hale* v. *Lamb*, 2 Ed. 294, per Lord Northington; *Fursaker* v. *Robinson*, Pr. Ch. 475; *Evelyn* v. *Templar*, 2 B. C. C. 148; *Colman* v. *Sarrel*, 3 B. C. C. 12; *Jefferys* v. *Jefferys*, Cr. & Ph. 138; *Meek* v. *Kettlewell*, 1 Hare, 474; *Fletcher* v. *Fletcher*, 4 Hare, 74; *Newton* v. *Askew*, 11 Beav. 145; *Dening* v. *Ware*, 22 Beav. 184; *Dillon* v. *Coppin*, 4 M. & Cr. 647; *Kekewich* v. *Manning*, 1 De G. M. & G. 188; Poll. Cont. 4th ed. 184.

(*g*) *Dillon* v. *Coppin*, 4 My. & Cr. 647, 671; *Antrobus* v. *Smith*, 12 Ves. 39; *Jefferys* v. *Jefferys*, Cr. & Ph. 138; *Tatham* v. *Vernon*, 29 Beav. 604; *Holloway* v. *Headington*, 8 Sim. 324; *Joyce* v. *Hutton*, 11 Ir. Ch. Rep. 123, S. C. 12 Ir. Ch. Rep. 71, overruling *Colman* v. *Sarrel*, 3 Bro. C. C. 12; *Ellis* v. *Nimmo*, Ll. & G. (t. Sug.) 333; *Rodgers* v. *Marshall*, 17 Ves. 294, and other cases cited and stated 4 My. & Cr. 664 et seq.; *Thompson* v. *Atfield*, 1 Vern. 40; *Chapman* v. *Gibson*, 3 Bro. C. C. 229; *Sarth* v. *Blanfrey*, Gilb. Eq. 166; and see Lewin. Tr. 8th ed. 72.

(*h*) *Groves* v. *Groves*, 3 V. & J. 163; *In re Anstis*, 31 Ch. D. 596; Fry, Sp. Pf. 2nd ed. 42.

(*i*) Per Lord Westbury in *Dillwyn* v. *Llewellyn*, 4 D. F. & J.

will it in any manner recognize any voluntary instrument which does not complete the transfer of the property (*k*).

There are, indeed, a few cases of family [391] arrangements of which specific performance will be enforced, though they are unsupported by what would be considered a valuable and sufficient consideration as against either creditors or purchasers (*l*). In all other cases, however, the same consideration is necessary to induce the Court to lend its aid to perfect a contract between the parties as to support the transaction against either creditors or purchasers; and if the transfer is voluntary (*m*), in order to make it binding between the parties and against strangers, it must be absolutely complete.

Family arrangements sometimes enforced without adequate value.

It follows from this that the Court will not enforce a covenant to surrender copyholds in favour of volunteers, although children or near relations (*n*). So, an omission (*o*) or defect (*p*) in a voluntary deed will not in general be supplied in equity. Nor can the voluntary deed be rectified in accordance with the agreement; the instrument is either good or bad as it stands; it cannot be modified to suit former intentions (*q*), for this would, in fact, be a recognition and enforcement of the voluntary agreement.

Covenant to surrender copyholds, &c., not enforced for volunteers.

Where A. and B. for valuable consideration enter into an agreement between themselves to do some act for the benefit of C., who is not a party to that agreement, A. and B. can mutually enforce that agreement (*r*).

Contract for value between two persons for benefit of third enforceable by either of the two, but not generally by the third.

521; and see *Colman* v. *Sarrel*, 3 Bro. C. C. 12, 1 Ves. Jun. 50; *Adams* v. *Claxton*, 6 Ves. 225, 230; *Dening* v. *Ware*, 22 Beav. 184; post, pt. v. ch. ii.

(*k*) See *Lister* v. *Hodgson*, L. R. 4 Eq. 30, 33–34; post, pt. v. ch. ii.

(*l*) See *Williams* v. *Williams*, L. R. 2 Ch. 294; ante, pp. 276, 277.

(*m*) As to what transfers are voluntary, see ante, pp. 243 et seq.

(*n*) *Jefferys* v. *Jefferys*, Cr. & Ph. 138; *Dening* v. *Ware*, 22 Beav. 184; *Steele* v. *Waller*, 28 Beav. 466; *Tatham* v. *Vernon*, 29 Beav. 604; *Green* v. *Paterson*, 32 Ch. D. 95; and see note (*g*), ante, p. 390.

(*o*) *Lee* v. *Henley*, 1 Vern. 37.

(*p*) Note to *Bonham* v. *Newcomb*, 2 Vent. 365; *Williamson* v. *Codrington*, 1 Ves. 511, 514; *Thompson* v. *Attfield*, 1 Vern. 40; and cases infra.

(*q*) *Phillipson* v. *Kerry*, 32 Beav. 628, S. C. 638; *Lister* v. *Hodgson*, L. R. 4 Eq. 30; post, pt. v. ch. v.

(*r*) *Goring* v. *Nash*, 3 Atk. 189; *Davenport* v. *Bishopp*, 2 Y. & C. Ch. 451, S. C. 1 Phil. 698; *Westbury* v. *Clapp*, 3 N. R. 633.

But C., as he is not a party to the agreement and a mere volunteer, cannot, as a rule, compel either A. or B. to perform it (*s*).

So, marriage articles will not, in the absence of proof [* 392] of a *bargain, be enforced at the suit of collaterals claiming by an ulterior limitation to them as volunteers (*t*).

So, in a separation deed it was held that a covenant for value entered into between the husband and trustees for the wife could not be enforced by the children, because, upon the true construction of the whole instrument, the contract had not been entered into with them, and did not give them a beneficial right under it (*u*).

And specific performance of a post-nuptial contract (*v*) between husband and wife will not be enforced in favour of children, even if it is founded on a valuable consideration between the husband and wife (*w*), or third persons (*x*), unless a bargain can be proved to have been then made on their behalf (*y*); for the consideration of marriage is not infused into that contract (*z*).

Exception if in *ante-nuptial* contract.

There is one class of exceptions to this general rule. If the covenant be contained in an *ante-nuptial* (*a*) settlement, then the Court will enforce it, in favour either of children of the then intended marriage, or of those of a widow, and perhaps also of a widower, who were in existence on her or his re-marriage; for such children are not in the position of ordinary volunteers, but are within the consideration of the marriage, al-

(*s*) *Crow* v. *Rogers*, 1 Str. 592; *Colyear* v. *Mulgrave*, 2 Keen, 81 98; *Hill* v. *Gomme*, 1 Beav. 540, S. C. 5 My. & Cr. 250; *Joyce* v. *Hutton*, 11 Ir. Ch. Rep. 123, S. C. 12 Ir.-Ch. Rep. 77; *Cramer* v. *Moore*, 3 Sm. & Giff. 141; *Gale* v. *Gale*, 6 Ch. D., per Fry, J., 148; *In re D'Angibau*, 15 Ch. D., per Cotton, L.J., 242 ; Fry, Sp. Pf. 2nd ed. 77 et seq.; *In re Empress Engineering Co.*, 16 Ch. D. 125; and see *In re Flavell*, 25 Ch. D. 89.

(*t*) *Sutton* v. *Chetwynd*, 3 Mer. 249, 355; ante, pp. 342 et seq.

(*u*) *Gandy* v. *Gandy*, 30 Ch. D. 57; ante, p. 303.

(*v*) *Jefferys* v. *Jefferys*, Cr. & Ph. 138; *Gale* v. *Gale*, 6 Ch. D., per Fry, J., 152.

(*w*) *Joyce* v. *Hutton*, 12 Ir. Ch. Rep. 71 ; *Green* v. *Paterson*, 32 Ch. D. 95.

(*x*) *Tweddle* v. *Atkinson*, 1 B. & S. 393.

(*y*) Ante, pp. 342, 357 et seq.

(*z*) *Green* v. *Paterson*, 32 Ch. D., per Cotton, L.J., 105, and per Fry, L.J., 106, 107.

(*a*) *Gale* v. *Gale*, 6 Ch. D., per Fry, J., 148.

though they are not parties to the marriage contract (*b*). In all marriage contracts the children of the marriage in contemplation of which a settlement has been executed, are not only objects of, but *quasi* parties to, it (*c*).

Different rule in America.

In America, however, a person for whose benefit a contract is made may enforce it at law, although he is a stranger both to the contract and to the consideration (*d*).

[* 393]

*But it seems that in such cases the volun- teers are entitled to have the trusts rectified according to the intention of the parties, if they can make out a clear case of mistake (*e*).

All this goes on the ground that the voluntary conveyance was not complete, and that the agreement or imperfect conveyance, which the Court refuses to enforce, was merely executory; that the gift still remained *in fieri*, it being the intention of the donor to perfect the transfer by some subsequent transaction (*f*).

Voluntary agreement made good by subsequent acts of donee.

A voluntary agreement, although incomplete, may sometimes be enforced upon a totally different ground. That ground is, that the subsequent acts of the donor have given the donee that right or ground of claim which he did not acquire from the original gift. Those acts may have supplied a valuable consideration originally wanting.

Thus, if A. gives a house to B., but makes no formal conveyance, and the house is afterwards, on the marriage settlement of B., included, with the knowledge of A., in the marriage of B., A. would be bound to complete the title of the parties claiming under that settlement. So, if A. puts B. in possession of a piece of land, and tells him, "I give it to you that you may build a house on

(*b*) *Gale* v. *Gale*, 6 Ch. D. 144; *In re D'Angibau*, 15 Ch. D., per Cotton, L.J., 242; Fry, Sp. Pf. 2nd ed. 78; Pollock, Cont. 4th ed. 202; ante, pp. 249, 352.

(*c*) *Hill* v. *Gomme*, 5 My. & Cr. 254, per Lord Cottenham, L.C.; and see *Green* v. *Paterson*, 32 Ch. D., per Fry, L.J., 106.

(*d*) Throop, Verb. Ag. (Amer.), 408, 419.

(*e*) *Thompson* v. *Whitmore*, 1 J. & H. 268; post, pt. v. ch. v.

(*f*) It seems clear that the old law was, that, even where the property was not intended to be actually transferred, the Court would supply defects in favour of wives and children. See cases cited ante, p. 389, end of note (*b*); *Ellis* v. *Nimmo*, Ll. & G. (t. Sug.) 333; the last of this class of cases was overruled by *Jefferys* v. *Jefferys*, Cr. & Ph. 138.

it," and B., on the strength of that promise, with the knowledge of A., expends a large sum of money in building a house accordingly, the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and complete the imperfect donation which was made (*g*).

But the Court will not assume that third parties have acted upon a promise which at first was voluntary; the ex post facto consideration must be alleged by those who rely on it (*h*).

Formal defect in execution of *powers*

supplied for wife or legitimate children.

Where a donor, who intends to make a perfect vol- [* 394] untary gift, *fails to do so by some *formal* defect (*i*) in the instrument by which he intends to complete the transfer, in that case equity will supply the defect; not, indeed, in favour of pure volunteers, but still in favour of certain persons who do not claim by virtue of any valuable consideration—viz., a wife or legitimate children.

Defective execution of powers aided

Thus, although volunteers will not be aided by surrender of copyholds, and in most instances "the execution of a power and surrender of a copyhold (*k*) go hand in hand, precisely on the same ground" (*l*), yet the *defective* execution of a power will in certain cases be supplied in equity in favour of the wife or legitimate child of the donee of the power which that donee has ineffectually attempted to exercise, even in a voluntary deed (*m*).

(*g*) *Dillwyn* v. *Llewellyn*, 4 D. F. & J., per Lord Westbury, L.C., 521; and see the remarks of Jessel, M.R., *In re Barker's Estate*, 44 L. J. (N.S.) Ch. 490. As to ex post facto consideration generally, see ante, pp. 315 et seq.

(*h*) *Lambert* v. *Northern Railway of Buenos Ayres Co.*, 18 W. R. 180.

(*i*) As to appointments by *will*, see the Wills Act (7 Will. 4 & 1 Vict. c. 26), ss. 9, 10. And with regard to appointments by *deed* in exercise of powers, see the Law of Property and Trustees' Relief Amendment Act (22 & 23 Vict. c. 35), s. 12.

(*k*) To the uses of a *will* see *Tollet* v. *Tollet*, 2 P. Wms. 489, Mos. 46, 2 Eq. Ca. Ab. 233, 663; 1 Wh. & Tu. L.C. 6th ed, 271.

(*l*) Per Lord Alvanley in *Chapman* v. *Gibson*, 3 Bro. C. C. 229; and see *Sayer* v. *Sayer*, 7 Hare, per Sir J. Wigram, V.C., 387.

(*m*) *Bath and Montague's Case*, 3 Ch. Ca. 106; *Smith* v. *Ashton*, 1 Ch. Ca. 264; Anon. Freem. Ch. 197; *Baker* v. *Jennings*, Freem. Ch. 234; *Fothergill* v. *Fothergill*, Freem. Ch. 257; *Sneed v. Sneed*, 1 Amb. 64; *Churchman* v. *Harvey*, 1 Amb. 335, 341; *Wilkes* v. *Holmes*, 9 Mod. 485; *Sarth* v. *Blanfrey*, Gilb. Eq. 166; *Hume* v. *Rundell*, 6 Mad. 331; *Hardham* v. *Roberts*, and cases cited in note, 1 Vern. 132-3; *Garn* v. *Garn*, 16 Ves. 268, 1 Eq. Ca. Abr. 122 et seq.; *Lucena* v. *Lucena*, 5 Beav. 249; *Barron* v. *Constabile*, 7 Ir. Ch. Rep.

for wife and legitimate children only.

But a wife and legitimate children are the only relations in whose favour the Court will supply defects in the voluntary execution of a power on the ground of meritorious consideration (*n*) and for no other persons, whether relatives of the appointor — grandchildren (*o*), natural children (*p*), father or mother (*q*), *brothers or sisters (*r*), nephews and nieces (*s*), [* 395] cousins (*t*), or a husband (*u*)—or a mere volunteer, even if the creator of the power (*v*); nor will a defect in a revocation under a power be supplied in favour of the settlor himself (*w*), nor will this extraordinary jurisdiction be exercised in favour of trustees, to screen them from the effects of a breach of trust in having acted on an informal appointment (*x*); for all these are looked on as mere volunteers, and cannot be aided in equity.

The defect may also be supplied when the appointee

467; *Proby* v. *Landor*, 28 Beav. 504; *Morse* v. *Martin*, 34 Beav. 500; *Kennard* v. *Kennard*, L. R. 8 Ch. 227; *Bruce* v. *Bruce*, L. R. 11 Eq. 371; Farwell, Pow. 274 et seq.

(*n*) See Sug. Pow. 8th ed. 535; notes to *Tollet* v. *Tollet*, 1 Wh. & Tu. L. C., 6th ed. 274 et seq.; and *Goodwyn* v. *Goodwyn*, 1 Ves. 226, 228; *Byas* v. *Byas*, 2 Ves. 164–5.

(*o*) *Kettle* v. *Townsend*, 1 Salk. 187, 1 Eq. Ca.; Ab. 122, in the H. of Lords, overruling the decision of Lord Somers; *Elton* v. *Elton*, 3 Atk. 504, 508; *Goodwyn* v. *Goodwyn*, 1 Ves. 226, 228; *Tudor* v. *Anson*, 2 Ves. 582; *Perry* v. *Whitehead*, 6 Ves. 544; *Strode* v. *Russel*, 2 Vern. 621, 625; but see contrà Anon. Freem. Ch. 197; *Watts* v. *Bullas*, 1 P. Wms. 60, and cases there cited; *Hill* v. *Downton*, 5 Ves. 557, 565; *Chapman* v. *Gibson*, 3 Bro. C. C. 229, 231; *Fursaker* v. *Robinson*, Prec. Ch. 475, 477.

(*p*) *Fursaker* v. *Robinson*, Prec. Ch. 475, 477; *Tudor* v. *Anson*, 2 Ves. 582; *Crickett* v. *Dolby*, 3 Ves. 12.

(*q*) *Sloane* v. *Cadogan*, Sug. Pow. app. (to 11th and prev. eds.) No. 24.

(*r*) *Goodwyn* v. *Goodwyn*, 1 Ves. 226–8; *Goring* v. *Nash*, 3 Atk. 186–189, which overruled *Watts* v. *Bullas*, 1 P. Wms. 60.

(*s*) *Strode* v. *Russel*, 2 Vern. 621, 625; *Marston* v. *Gowan*, 3 Bro. C. C. 170.

(*t*) *Tudor* v. *Anson*, 2 Ves. 582.

(*u*) *Watt* v. *Watt*, 3 Ves. 244, where, however, the defect was more in substance than form; *Moodie* v. *Reid*, 1 Mad. 516; *Hughes* v. *Wells*, 9 Hare, 749, 764; unless of course he claims as a purchaser under a marriage settlement or otherwise: *Sergeson* v. *Sealey*, 2 Atk. 412, 414–5.

(*v*) *Smith* v. *Ashton*, Freem. Ch. 309; *Vane* v. *Fletcher*, 1 P. Wms. 352–354; *Sergeson* v. *Sealey*, 2 Atk. 412–5; *Godwin* v. *Kilsha*, 2 Amb. 684–5, Reg. Lib. A. 1768, fol. 495; and see note to *Watts* v. *Bullas*, 1 P. W. 60.

(*w*) *Ward* v. *Booth*, 3 Ch. Ca. 69, 72; *Sergeson* v. *Sealey*, 9 Mod. 390, 2 Atk. 412–4; Sug. Pow, 8th ed. 539; *Ellison* v. *Ellison*, 6 Ves. 656.

(*x*) *Hopkins* v. *Myall*, 2 Russ. & My. 86; *Reid* v. *Thompson*, 2 Ir. Ch. Rep. 26.

For partial interest.

has a limited interest only; even though the persons entitled in remainder over are not entitled to have it supplied for them at the same time (*y*).

Court gives effect to intention of donee of power.

The principle upon which the Court proceeds in aiding the defective execution of powers is to give effect to the true *intention* of the donee of the power.

The real question is, does it sufficiently appear that there was an *intention* on the part of the donee to give the property he had power to dispose of (*z*)?

What defects Court aids.

The jurisdiction of the Court is to supply defects occasioned by mistake or inadvertence; not to supply omissions intentionally made (*a*). And the Court will aid a defect only in a matter of form, and not where it is of the substance and essence of the power. It will never uphold an act which will defeat what the person creating the power has declared, by expression or necessary implication, to be a material part of his intention (*b*).

[*396] *So where a power to appoint by deed has been exercised by will (*c*) the Court will relieve. So, where a power to appoint by an instrument sealed and delivered has been executed by one not sealed and delivered (*d*), the Court will relieve against the defective execution.

But the Court will not relieve where a power to appoint by will has been exercised by deed; for the distinction between a deed, which speaks from the moment of its execution, and a will, which speaks from the death, is marked and substantial (*e*).

(*y*) See *Marston* v. *Gowan*, 3 Bro. C. C. 170, cases cited in note, p. 171.

(*z*) *Cooper* v. *Martin*, L. R. 3 Ch. 47; *Garth* v. *Townsend*, L. R. L. R. 11 Eq 371; *Pennefather* v. *Pennefather*, Ir. R. 7 Eq. 300, 318. 7 Eq. 220; *Kennard* v. *Kennard*, L. R. 8 Ch. 227; *Bruce* v. *Bruce*,

(*a*) *Garth* v. *Townsend*, L. R. 7 Eq. 223, per Sir W. M. James, V.C.

(*b*) *Cooper* v. *Martin*, L. R. 3 Ch. 47, 58; and see *Wilkes* v. *Holmes*, 9 Mod. 485–6 per Lord Hardwicke; *Medwin* v. *Sandham*, 3 Sco. 685; *Watt* v. *Watt*, 3 Ves. 244; Farwell, Pow. 259 et seq.

(*c*) *Sneed* v. *Sneed*, 1 Amb. 64; *Mills* v. *Mills*, 8 Ir. Eq. Rep. 192; *Bruce* v. *Bruce*, L. R. 11 Eq. 371.

(*d*) *Kennard* v. *Kennard*, L. R. 8 Ch. 237.

(*e*) *Reid* v. *Shergold*, 10 Ves. 370; *Cooper* v. *Martin*, L. R. 3 Ch. 47; and see *Hervey* v. *Hervey*, 1 Atk. 561; *Stratford* v. *Lord Aldborough*, 1 Ridg. P. C. 281, 285; *Adney* v. *Field*, 2 Amb. 654; *Scott* v. *Davies*, 4 My. & Cr. 87; *Mills* v. *Mills*, 8 Ir. Eq. 192; Sug. Pow. 8th ed. 560–1; and see notes to *Tollet* v. *Tollet*, 1 Wh & Tu. L. C. 6th ed. 270 et seq.

The wife or legitimate child who is the appointee under the power must prove the intention of the donee to execute that power (*f*).

Onus to prove intention of donee lies on appointee.

It has been frequently decided that the Court will relieve against a defective execution of a power *by* a married woman, in favour of a creditor or purchaser (*g*); although this has been doubted by Sir Thomas Plumer (*h*), upon the ground that she could not enter into a binding contract.

Will Court relieve against defective execution *by* married woman?

The point has not been expressly decided whether the Court will relieve against a defective execution of a power *by* a married woman in favour of her child, where the consideration is merely meritorious. The dicta of Lord Northington, L.C., in *Wright* v. *Lord Cadogan* (*i*), although not necessary for the decision in that case, shew plainly his opinion that the Court would so relieve where there is a meritorious quality in the person who is to take *under the appointment [* 397] And upon principle it would seem to be immaterial to the granting of such relief what was the quality of the appointer (*k*).

Principle considered.

The extraordinary relief thus afforded by the Court to wives and legitimate children forms an exception to the general rule that nothing less than a valuable consideration will secure the intervention of the Court to alter legal rights.

The exception thus created can hardly be said to be governed by any definite principle of reasoning; for, though it is said to be founded on the legal obligation of providing for a wife and children (*l*), it is not affected by the question whether they are already sufficiently provided for (*m*); and, though professing to

(*f*) *Blake* v. *Mancell*, 2 B. & B. 38, n; *Pennefather* v. *Pennefather*, Ir. R. 7 Eq. 317; Farwell, Pow. 157.

(*g*) *Pollard* v. *Grenvil*, 1 Ch. Ca. 10; *Doe* v. *Weller*, 7 T. R. 478, 480; *Dowell* v. *Dew*, 1 Y. & C. Ch. 345; *Stead* v. *Nelson*, 2 Beav. 245; *Thackwell* v. *Gardiner*, 5 D. & Sm. 58, 65; Farwell, Pow. 262.

(*h*) *Martin* v. *Mitchell*, 2 Jac. & W. 413, 425. It seems doubtful whether Sir T. Plumer was referring to cases of defective execution of powers, or merely to contracts *in fieri*. See Sug. Pow. 8th ed. 536, 537; and *Dillon* v. *Grace*, 2 Sch. & Lef. 456.

(*i*) 2 Eden, 252, 253, 259.

(*k*) Sug. Pow. 8th ed. 536, 537; Story, Eq. Jur. 12th ed. 95.

(*l*) Per Lord Loughborough in *Hills* v. *Downton*, 5 Ves. 557, 563–4.

(*m*) *Kettle* v. *Townsend*, 1 Salk. 187; *Smith* v. *Baker*, 1 Atk. 386; *Hervey* v. *Hervey*, 1 Atk. 568; *Chapman* v. *Gibson*, 3 Bro. C. C. 229.

be used for the purpose of assisting the "discharge of moral and natural obligation" (*n*), it draws an arbitrary line which can hardly be said to be co-extensive with such obligations.

Voluntary gift must be perfect.

In no other instance will less than a valuable consideration set in motion the machinery of the Court to enforce a voluntary contract, or to compel the donor to perfect an imperfect gift.

If the donor is the legal owner and makes a legal assignment, the Court requires everything to have been done which was requisite for making the legal transfer complete. Where the donor, being mere equitable owner, is desirous that his trustee shall become a trustee for the object of his bounty, the Court requires clear and distinct evidence of a declaration of trust in favour of the donee (*o*); and, as Lord Thurlow said (*p*), "Wherever a voluntary deed is not sufficient to pass the subject out of the conveyer, there it never can be carried into execution without it is supported by a valuable consideration." Every case on the point professes to adhere to this rule, but it will be found that [* 398] * opinions as to what is "sufficient to pass the subject out of the conveyer" are, to some extent, conflicting.

Legal liability though no legal transfer.

Where by a perfect voluntary instrument a person has subjected himself to a *legal* liability, although the legal transfer of the property may not be thereby complete, the Court will enforce that *legal* liability; and the fact that the claimant is a mere volunteer is of no value in favour of those who represent the author of the instrument (*q*).

So where by bond (*r*), covenant (*s*), promissory

(*n*) Per Lord Alvanley in *Chapman* v. *Gibson*, 3 Bro. C. C. 229–230; and see per Lord Northington, L.C., in *Wright* v. *Lord Cadogan*, 259.

(*o*) *Bentley* v. *Mackay*, 15 Beav. 12, 18–19; see note to *Bonham* v. *Bonham*, 2 Vent. 365.

(*p*) See *Colman* v. *Sarrell*, 1 Ves. Jun. 50, 54.

(*q*) *Fletcher* v. *Fletcher*, 4 Hare, 74, 76, 77; and see *Budge* v. *Budge*, 16 Beav. at p. 34.

(*r*) *Ramsden* v. *Jackson*, 1 Atk. 294; *Hall* v. *Palmer*, 3 Hare, 532; *Garrard* v. *Lord Dinorben*, 5 Hare, 213; *Dening* v. *Ware*, 22 Beav. 184; *Markwell* v. *Markwell*, 34 Beav. 12.

(*s*) *Williamson* v. *Codrington*, 1 Ves. 511; *Giles* v. *Roe*, 2 Dickens, 570; *Clough* v. *Lambert*, 10 Sim. 174; *Fletcher* v. *Fletcher*, 4 Hare, 67; *Watson* v. *Parker*, 6 Beav. 283; *Lomas* v. *Wright*, 2

note (*t*), or otherwise (*u*), a person has voluntarily subjected himself to a *legal* liability, has created a debt in favour of a volunteer, and the Court is not called upon to do any act to perfect the instrument (*v*), the Court, if the *legal* title is free from doubt, will enforce that instrument. If the *legal* title is doubtful, the Court will let the parties try it at law (*w*), and, if it be doubtful whether the instrument be voluntary or for value, may direct an issue (*x*).

This question frequently arises in the administration of the estate of the voluntary donor. The Court, where the *legal* title is clear, will enforce the claim of the volunteer against the assets of the voluntary donor (*y*); postponing the claim, of course, to that of a creditor for value (*z*), but preferring it to that of a legatee (*a*).

In bankruptcy (*b*), however, whether under the Act of * 1869 (*c*) or that of 1883 (*d*), a volun- [* 399] tary debt is paid *pari passu* with a debt for value (*e*).

So Lord Hardwicke said (*f*), "Undoubtedly a bill may be for satisfaction of a debt out of assets real and personal, which debt may be created voluntarily by the testator; for though one cannot come into Equity to supply a defect in a voluntary deed without consideration; or, in many instances, cannot come for specific performance of such an agreement: yet, if he has a specialty, he does not want proof of consideration, but

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My. & K. 769; *Alexander* v. *Brame*, 19 Beav. 436; *Hales* v. *Cox*, 32 Beav. 118; *Bonfield* v. *Hassall*, 32 Beav. 217; *Patch* v. *Shore*, 2 Dr. & Sm. 589.

(*t*) *Lloyd* v. *Chune*, 2 Giff. 441; *Dawson* v. *Kearton*, 3 Sm. & G. 186; *Arthur* v. *Clarkson*, 35 Beav. 458.

(*u*) *Fairbeard* v. *Bowers*, Prec. Ch. 17; *Ex parte Pottinger*, 8 Ch. D. at p. 626.

(*v*) *Fletcher* v. *Fletcher*, 4 Hare, 67, 74.

(*w*) *Colman* v. *Sarrel*, 1 Ves. Jun. 50; *Alexander* v. *Brame*, 19 Beav. 436; *Hervey* v. *Audland*, 14 Sim. 531.

(*x*) *Hepworth* v. *Heslop*, 6 Hare, 561.

(*y*) Supra.

(*z*) *Patch* v. *Shore*, 2 Dr. & Sm. 589; *Blount* v. *Doughty*, 3 Atk. 483; *Ramsden* v. *Jackson*, 1 Atk. 294.

(*a*) *Markwell* v. *Markwell*, 34 Beav. 12, 418; *Patch* v. *Shore*, 2 Dr. & Sm. 589; *Adames* v. *Hallett*, L. R. 6 Eq. 468; *Ex parte Pottinger*, 8 Ch. D. 621, 626.

(*b*) *In re Maggi*, 20 Ch. D. 545.

(*c*) 32 & 33 Vict. c. 71, s. 32.

(*d*) 46 & 47 Vict. c. 52, s. 40 (4).

(*e*) *Ex parte Pottinger*, 8 Ch. D. 621, 626.

(*f*) *Williamson* v. *Codrington*, 1 Ves. 514-5.

may come into Equity as well as law to have satisfaction for the debts on that specialty out of assets; and then the Court will not send it to law, but will judge whether he has a specialty or not. Indeed, if it appears doubtful to the Court whether it is a specialty on which an action at law could be maintained, or the damages so uncertain that it could not be settled without being tried by a jury, the court will as in other cases, have the aid of a Court of law; but, unless such a necessity, will not send it to law to make two suits out of one" (*g*).

But where there is no valid *legal* liability, the Court will not enforce a voluntary promise against the estate of the voluntary donor.

Marler v. *Tommas.*

In *Marler* v. *Tommas* (*h*) a post-nuptial settlement was executed by a married woman of her property. It contained an untrue recital that she had paid the trustee a sum of £2000, and he executed the deed upon the faith of a promise made to him by her to pay him this sum out of her separate estate. No such payment was ever made. It was held by Sir George Jessel, M.R., that, as a bare volunteer could not enforce this promise against the assets of the promisor, the married woman's estate could not be made liable to pay this sum either by the trustee or a volunteer under the settlement.

Covenants.

[* 400] *Where executors refused to perform a voluntary covenant for further assurance entered into by their testator, the Court, in a suit to administer the covenantor's estate by a third person, refused to allow the covenantee to prove as a creditor, but allowed him to bring an action at law for damages (*i*). But in *Cox* v. *Barnard* (*k*) Sir J. L. Knight Bruce, V.C., in a suit to administer the estate of a testator who had entered into the usual covenant for further assurance, held that the covenantee was entitled to damages from the Court

(*g*) See also *Vernon* v. *Vernon*, 2 P. Wms. 595, S. C. 4 Bro. P. C. 26, commented on in *Stephens* v. *Trueman*, 1 Ves. 74; and see *Goring* v. *Nash*, 3 Atk. 186; *Boughton* v. *Boughton*, 1 Atk. 625; *Colman* v. *Sarel*, 1 Ves. Jun. 50, 3 Bro. C. C. 12, 14–15; *Saltern* v. *Melhuish*, 1 Amb. 247; *Davenport* v. *Bishopp*, 2 Y. & C. Ch. 451, 460, S. C. 1 Phil. 698.

(*h*) L. R. 17 Eq. 8; and see *Pownall* v. *Anderson*, 2 Jur. (N.S.) 857.

(*i*) *Hervey* v. *Audland*, 14 Sim. 531, 535; *Ward* v. *Audland*, 16 M. & W. 864; *Aulton* v. *Atkins*, 18 C. B. 249.

(*k*) 8 Hare, 318; commented on *Vogle* v. *Hughes*, 2 Sm. & G. 36; and see *Williamson* v. *Codrington*, 1 Ves. 512.

without having recourse to a Court of law. This was followed in *Hales* v. *Cox* (*l*), where the person entitled to the benefit of a covenant was held entitled to prove for damages against the assets of the testator under a covenant for quiet enjoyment.

Covenant whether with trustees or cestui que trust immaterial.

The fact that the covenant is made *not* with the person entitled to the benefit of it, but with trustees for him, makes no difference (*m*). The rights of the cestui que trust under the covenant do not depend on the caprice of the trustee so as to leave him without remedy if the trustee should refuse to bring an action. So, if the trustee refuses to enforce the covenant, the cestui que trust may use the name of the trustee in an action at law (*n*), or may bring an action in his own name in equity (*o*), as the case may require.

So, where the bill was filed to obtain satisfaction in respect of a voluntary covenant to transfer stock into the names of C. and D. as trustees, or some other person to be nominated by the cestui que trust, it was held that the suit could be sustained without making C. and D. parties (*p*).

Deed necessary.

A voluntary agreement to pay a sum of money should be contained in a deed in order to create a legal debt, for "every deed in itself imports a consideration—viz., the will of him that made * it; and therefore, [* 401] where the agreement is by deed, it shall never be called a nudum pactum" (*q*). In other respects, where at least the covenantor is living, or where specific performance of a covenant in a deed is sought, a voluntary agreement stands scarcely, or not at all, on a better footing than if it were contained in an instrument unsealed (*r*).

Same principles apply in America.

The same general principles obtain in America in relation to enforcing voluntary covenants in the adminis-

(*l*) 32 Beav. 118.

(*m*) *Fletcher* v. *Fletcher*, 4 Hare, per Sir J. Wigram, V.C., 77; and see *Gandy* v. *Gandy*, 30 Ch. D. 57, 74.

(*n*) *Fletcher* v. *Fletcher*, 4 Hare, per Sir J. Wigram, V.C., 78; *Bridge* v. *Bridge*, 16 Beav. 320–1; *Jerdein* v. *Knight*, 2 J. & H. 325.

(*o*) *Gandy* v. *Gandy*, 30 Ch. D. 73, 74, 75.

(*p*) *Watson* v. *Parker*, 6 Beav. 283.

(*q*) Plowd. 309; *Shubrick* v. *Salmond*, 3 Burr. 1637–9, 1 Fonbl. Eq. 342, n.

(*r*) *Kekewich* v. *Manning*, 1 De G. M. & G., per Knight Bruce, L.J., 188; ante, p. 390.

tration of the covenantor's estate, subject, of course, to the application of local statutes (*s*).

Second settlement of same fund creates no debt.

Where A. transferred stock into the names of trustees and executed a voluntary deed declaring the trusts, and then, by a second deed, attempted to declare different trusts of the same stock, and failed because he had no power to alter them, the consequence was held to be that the second deed became inoperative and failed altogether; that it was like settling particular chattels on one for life with remainder over, and by a subsequent deed attempting to give a life interest in them to some one else; that, the subject of the settlement being one and the same fund, which alone the second deed attempted to affect, no damages at law could be obtained on the second deed, which therefore gave no rights against the settlor's assets (*t*).

A voluntary conveyance of lands not in existence, but of a stated value, by a man to his servant, has been held good in equity between the parties, as a covenant to convey lands of equal value on which damages could be recovered at law (*u*).

(*s*) Rawle, Covenants (Amer.) 4th ed. 659 et seq.
(*t*) *Newton* v. *Askew*, 11 Beav. 145.
(*u*) *Carey* v. *Stafford*, 3 Sw. 427.

*CHAPTER II. [*402]

GIFT OF LEGAL AND EQUITABLE INTEREST INTER VIVOS.

Imperfect gift passes no property.

INASMUCH as an imperfect gift passes no property, the question, in the words of Lord Justice Knight Bruce, "whether an act or intended act of bounty, whether a gift or a promised or intended gift, was in truth a perfect act, a completed gift, resting neither in promise merely, nor merely in unfulfilled intention, or was incomplete, was imperfect, and rested merely in promise or unfulfilled intention" (*v*), is one of primary importance.

From its very nature this question is frequently one of difficulty and sometimes of very great nicety, owing to the circumstances of the case from which the true intention of the parties has to be inferred, and the propriety of carrying that intention into effect satisfactorily determined (*w*).

Complete gift *inter vivos* made in three ways.

A complete gift *inter vivos* of property of any kind whatever, either of real or personal property, in possession, reversion, or remainder, or of a thing in action, or of any interest in such property, may be effectually made in one or other of the following three ways:—

1. The donor may transfer the property to the persons for whom he intends to provide.

2. The donor may transfer the property to a third person, as trustee for the purposes of the settlement by which he provides for the intended donees.

*3. The donor may declare himself a trustee [*403] of the property for the intended donees (*x*).

(*v*) *Kekewich* v. *Manning*, 1 De G. M. & G. 187; *Harding* v. *Harding*, 17 Q. B. D. at p. 444.

(*w*) *Hartley* v. *Nicholson*, L. R. 19 Eq. 239; see 2 Spence. Eq. Jur. 881, 895; Lewin, 8th ed. ch. 6; *Ellison* v. *Ellison*, 1 Wh. & Tu. L. C. 6th ed. 300 et seq.; Dav. Prec. 3rd ed. vol. 3, 686 et seq.

(*x*) *Milroy* v. *Lord*, 4 D. F. & J., per Turner L.J. 274; *Warriner* v. *Rogers*, L. R. 16 Eq. 340; *Heartley* v. *Nicholson*, L. R. 19 Eq. 242.

What is a complete gift to the donees or to trustees for them.

The essential characteristics of a complete gift of property by either of the first two of these three ways is that the donor has parted with his entire interest in the property.

In order to establish a complete gift of property either by a direct transfer to the intended donees, or to trustees for them, it must be clearly proved that the donor has done such acts as amount to a conveyance or assignment of the property, so as completely to divest himself of his entire interest and confer that interest either on the donees (who then acquire the beneficial interest in the property) or on the trustees for them (*y*).

So, Lord Eldon said, in *Ellison* v. *Ellison* (*z*): "I take the distinction to be, that if you want the assistance of the Court to *constitute* you a cestui que trust, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you cestui que trust, as upon a covenant to transfer stock, &c., if it rests in covenant and is purely voluntary, this Court will not execute that voluntary covenant (*a*), but if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being actually made, the equitable interest will be enforced by this Court."

How donor can declare himself trustee.

The third mode of transfer of property—namely by the donor declaring himself a trustee for the donees—was clearly recognized by Lord Eldon in *Ex parte Pye* (*b*) when he said: "It is clear that this Court will not assist a volunteer; yet if the act is completed, though voluntary, the Court will act upon it. It has been decided that upon a covenant to transfer stock this Court will not interpose; but if the party has declared himself a trustee of that stock it becomes the property of the cestui que trust, without more, and the Court will act upon it."

[*404] *The question in cases of this last mode of transfer of property is whether the intending donor by acts or words, in addition to, and independent of, the imperfect gift, has constituted himself a trustee (*c*).

The difficulty consists in determining whether the

(*y*) See *Richards* v. *Delbridge*, L. R. 18 Eq., per Jessel, M. R. 14.
(*z*) 6 Ves. 662.
(*a*) *Colyear* v. *Countes of Mulgrave*, 2 Keen 81.
(*b*) 18 Ves. 149; *Meek* v. *Kettlewell*, 1 Hare, 470, S. C. 1 Ph. 342.
(*c*) *Heartly* v. *Nicholson*, L. R. 19 Eq. 242.

particular circumstances of the case do or do not shew an *intention* on the part of the donor to make himself a trustee, and to deprive himself thenceforward of the beneficial ownership of the property. For a man to make *himself* a trustee there must be an expression of intention to become a trustee (*d*). It is not necessary that the declaration of a trust should be in terms explicit. But what is necessary is that the donor should have evinced by acts which admit of no other interpretation that he himself had ceased to be, and that some other person had become, the beneficial owner of the subject of the gift or transfer, and that such legal right to it if any, as he retained was held by him in trust for the donee (*c*).

Mode of declaring trust.

The mode in which such a trust may be declared depends on the nature of the property.

A trust of personal property may be declared by parol or in writing (*e*); while a trust of real property must be proved by writing signed by the person enabled by law to declare the trust in order to satisfy the Statute of Frauds (*f*).

Voluntary declaration of trust is good.

If a man declare himself a trustee of the property he has made a complete gift of the beneficial interest (*g*), and therefore, whatever rule there may be against enforcing a claim by a volunteer, it does not apply to the case of a cestui que trust who claims against his trustee. For that which is considered by the jurisdiction of equity a trust may certainly be created gratuitously. A trust is not affected by the doctrine that a voluntary agreement, or mere *nudum pactum*, cannot be enforced by the volunteer, *be- [*405] cause in effect no contract has been made with him (*h*); and therefore the absence of consideration for its creation is absolutely immaterial (*i*). If the title is so far com-

(*c*) *Heartley* v. *Nicholson*, L. B. 19 Eq. 242.
(*d*) *Richards* v. *Delbridge*, L. R. 18 Eq. 15.
(*e*) *Milroy* v. *Lord*, 4 D. F. & J. 274; post pp. 414, 444.
(*f*) Section 7; post, p. 443.
(*g*) *Meek* v. *Kettlewell*, 1 Hare, 464, 472, S. C. 1 Ph. 342; *Warriner* v. *Rogers*, L. R. 16 Eq. 340; *Richards* v. *Delbridge*, L. R. 18 Eq. 11; *Heartley* v. *Nicholson*, L. R. 19 Eq. 233; and see *Harding* v. *Harding*, 17 Q. B. D. at p. 444.
(*h*) Post, pp. 447 et seq.
(*i*) *Kekewich* v. *Manning*, 1 De G. M. & G, 189–190; *Ex parte Pye*, 18 Ves. 140, 149; *Sloane* v. *Cadogan*, Sug. V. & P. app. to 11th and previous editions, and stated in *Beatson* v. *Beatson*, 12 Sim. 291; *James* v. *Bydder*, 4 Beav. 600; *Drosier* v. *Brereton*, 15

plete that the Court is not called upon to act against the assignor, it will assist the donee in obtaining the property from any person who would be treated as a trustee for him. A declaration of trust is considered, in equity, as equivalent to a transfer of the legal estate; and if the transaction by which the trust is created is complete, and if what has been done is equivalent to a transfer of the legal estate, the Court will act upon it and enforce it (*k*). So, where the ultimate trust declared by a settlement was for the next of kin of the settlor, the property having been duly transferred to the trustees, the Court refused to allow the trust to be put an end to, although the next of kin were mere volunteers (*l*).

Of course a complete voluntary deed expressed and intended to be irrevocable cannot be set aside merely because after executing it the grantor has changed his mind (*m*). But, if a perfect voluntary instrument is being prepared, and the settlor dies before it is actually completed, it is void (*n*).

It is evident that each individual case must vary according to the nature of the property assigned, the interest of the donor in that property, and the mode in which he intended his gift to operate.

Classification of cases.

The best classification of the cases appears to be as follows:—

I. Gift with power and intention to transfer *legal* title.

I. Cases in which the donor has both the legal and [* 406] the * equitable interest in the property; or, where he has only the equitable interest, but can obtain a transfer of the *legal* interest, either to the donees, or to trustees for them (*o*).

Beav. 221; *Jones* v. *Lock*, L. R. 1 Ch. 25, where Lord Cranworth said the dictum attributed to him in *Scales* v. *Maude*, 6 De G. M. & G. 51, must have had reference to the special circumstances of the case. He was there clearly referring to the rule that an imperfect legal assignment will not be supported as a declaration of trust unless for value. Lord Thurlow used words almost identical in *Colman* v. *Sarrel*, 3 Bro. C. C. 14.

(*k*) Per Lord Hatherley (then Sir W. P. Wood, V.C.) in *Donaldson* v. *Donaldson*, Kay, 718; *In re Walhampton Estate*, 26 Ch. D. 396.

(*l*) *Paul* v. *Paul*, 20 Ch. D. 742.

(*m*) *Toker* v. *Toker*, 31 Beav. at p. 644, S. C. 3 D. J. & S. 487; *Coutts* v. *Ackworth*, L. R. 8 Eq. 563, 564.

(*n*) *Coningham* v. *Punkett*, 2 Y. & C. C. C. 245; *Lambert* v. *Overton*, 13 W. R. 227.

(*o*) Post, pp. 425 et seq.

II. Cases in which the donor, whether he is in fact the legal and equitable owner, or merely the equitable owner of the property, only intends to confer on his donees his *equitable* interest in that property (*p*). II. Gift of mere *equitable* interests.

III. Cases in which the donor wishes to give his donees the benefit of property belonging to him, which is of a *legal* nature, but which is not assignable at law (*q*). III. Gift of *legal* interest not *legally* assignable.

In this chapter it is only proposed to consider the cases which arise under the first class; which really consist of two divisions.

I. Cases in which the donor is both the legal and equitable owner, and intends to convey his interest to the donees direct or to trustees for them (*r*). Donor parts with *legal* estate.

It is clear that where the property has been actually conveyed or transferred to the donees, so as to give them a good title at law, the gift is complete. Gift complete when legal transfer is complete, even if donee is ignorant of gift.

And it has been decided that a complete gift of real or personal property vests the property in the donee at once, subject to his dissent. The donee may by his dissent render that gift null and void; but the fact that he is wholly ignorant of the transfer does not affect the transfer of the legal title to the property (*s*).

It is a well-established principle that, if a voluntary gift is intended to be effectuated in one way, the Court will not give effect to it by applying another way. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust (*t*). The Court will not alter the intended *mode* of gift.

*But although the Court will not convert an im- [*407]

(*p*) Post, pp. 438 et seq.
(*q*) Post, pp. 453 et seq.
(*r*) Post, pp. 407 et seq.
(*s*) *Butler's and Baker's Case*, 3 Rep. 25 a; *Thompson* v. *Leach*, 2 Vent. 198; *Siggers* v. *Evans*, 5 E. & B. 367; *Standing* v. *Bowring*, 31 Ch. D. 282.
(*t*) *Milroy* v. *Lord*, 4 D. F. & J. 274, post, p. 414; *Richards* v. *Delbridge*, L. R. 18 Eq. 15; *Moore* v. *Moore*, L. R. 18 Eq. 482, 483, 484; *Heartley* v. *Nicholson*, L. R. 19 Eq. 241, 242; *In re Breton's Estate*, 17 Ch. D. 41; *Lee* v. *Magrath*, 10 L. R. Ir. 45, 313; *In re Shield*, 53 L. T (N. S.) 5; post, pp. 430, 439.

perfect gift into a declaration of trust merely on account of that imperfection, yet an intending donor may by acts or words, in addition to, and independent of, the perfect gift, have constituted himself a trustee (*u*).

This question is one of the real *intention* of the donor, which has to be inferred from a consideration of all the facts of each particular case. If the gift is imperfect merely because the donor was mistaken as regards the proper and legal mode of effectuating that which he intended to do, the Court will not assist the volunteer by declaring the donor a trustee for him (*v*).

Gift of chattels

A gift of chattels may be made by parol; or the chattels may be assigned by deed.

by parol,

If the gift is made by parol, it was formerly held that it must be accompanied by actual delivery (*w*) in order to vest the legal estate in the donee (*x*) even if the chattels were at the time of the gift in his possession, and that until then the gift was revocable (*y*). In *Ward* v. *Audland* (*z*), however, Baron Parke dissented from this.

The true view seems now to be this. A parol gift of chattels is good without actual delivery, provided that there is a clear intention on the part of the donor to give, and also a clear intention on the part of the donee to receive and act upon such gift (*a*). It requires the assent of two minds to make a gift, as it does to make a contract. So an alleged gift of a cheque was held to be a loan, as it had not been received as a gift, but as a loan, by the alleged donee (*b*).

(*u*) *Heartley* v. *Nicholson*, L. R. 19 Eq. 242; *Baddeley* v. *Baddeley*, 9 Ch. D. 113.

(*v*) *In re Breton's Estate* 17 Ch. D. 420, 421; but see *Baddeley* v. *Baddeley*, 9 Ch. D. 113.

(*w*) *Shower* v. *Pilck*, 4 Ex. 478; and see *Spratley* v. *Wilson*, F. Holt, 10, 12, n., and the explanation of that case in *Bunn* v. *Markham*, 7 Taunt. 226–7, 2 Mars. 532, 535–6, Holt, 352; *Bourne* v. *Fosbrooke*, 18 C. B. (N.S.), per Erle, C.J., 524.

(*x*) *Irons* v. *Smallpiece*, 2 B. & Ald. 551; *Tate* v. *Hilbert*, 2 Ves. Jun. 120, S. C. 4 Bro. C. C. 286; *Miller* v. *Miller*, 3 P. Wms. 356, 358; and *Power* v. *Cook*, I. R. 4 C. L. 24.

(*y*) Jenk. Cent. 109, case 9, as to which see *Ward* v. *Turner*, 2 Ves. 442.

(*z*) 16 M. & W. 862.

(*a*) *Flory* v. *Denny*, 7 Ex. 583; *Winter* v. *Winter*, 9 W. R. 747; *Grant* v. *Grant*, 34 Beav. 624; *In re Harcourt*, 31 W. R. 578; *In re Ridgway*, 15 Q. B. D. 446; post, p. 410.

(*b*) *Hill* v. *Wilson*, L. R. 8 Ch. 888, 896.

Ten Austrian bonds transferable by delivery were given by a *memorandum signed by the tes- [*408] tator, and indorsed on the box which contained them, and its key was handed to the intended donee, while the box was kept by the testator till his death. It was held that, as no actual transfer of these bonds had taken place, the gift was incomplete (*c*). So where A., the owner of an old sword, wrote to B., his wife, directing her to deliver the sword to C., although A. also wrote to C. to express his wish that C. should have the sword, it was held the gift was incomplete, as the letters vested no present property in the sword in C. (*d*).

But where A. had insured his life and given the policy, of which he was the absolute owner, to his mother, and told her she might keep it, and had given her the receipts for two premiums which he had paid, it was held, on his death, to be a valid gift of the policy, but not of the money secured by it, to his mother (*e*).

The mere delivery of a *deed*, accompanied by a parol agreement to give the debt due on an equitable mortgage by deposit of that deed, is not a valid gift of the deed. The possession of the deed and the right to the beneficial interest under the equitable charge created by deposit of it are inseparable; the deed itself is merely incident to the charge, which cannot be transferred by a parol agreement, and therefore a good gift of the deed itself cannot be made by a mere delivery of it(*f*).

A complete gift of chattels can also be made by deed. In this case, as the *property* in the chattel passes by the deed, it is immaterial whether possession has or has not been delivered to the donee (*g*). The cases in which want of possession has been held to make such gifts void are those in which such absence of possession was evidence of fraud against third parties (*h*). or by deed.

If a gift of money be made and the person to whom Gift returned.

(*c*) *Trimmer* v. *Danby*, 25 L. J. (N.S.) Ch. 424; but see *In re Harcourt*, 31 W. R. 578.

(*d*) *Douglas* v. *Douglas*, 22 L. T. (N.S.) 127.

(*e*) *Rummens* v. *Hare*, 1 Ex. D. 169; but see *In re Richardson*, 30 Ch. D. 396.

(*f*) *In re Richardson*, 30 Ch. D. 396.

(*g*) Shep. Touch. 285; Com. Dig. tit. Biens, D. 2; *Carr* v. *Burdiss*, 1 C. M. & R. 782, 788, 5 Tyrw. 309, 316; *Siggers* v. *Evans*, 5 E. & B. 367.

(*h*) Ante, pp. 113 et seq.

it is given restores it to the owner, or in any way puts it back under his control, or into his power, the gift is at an end (*h*).

Gift conditional.

[* 409] *Every person who receives a gift of course receives that gift subject to whatever conditions the donor may have chosen to impose upon it, and until and unless such conditions are fulfilled by the donee the gift is incomplete (*i*). So a gift of property subject to a mortgage by the donor remains primarily liable to pay the mortgage debt (*k*).

Donatio mortis causâ,

The chief class of gifts, whether of chattels or other personal property, to which a condition is always annexed by the donor or implied by the law, is that of donations mortis causâ.

Such a gift must be made by the donor in contemplation of the near approach of his death. The condition to which such a gift is always subjected, either by the doner or by implication of law, is that the gift is to take effect *only* in the event of the donor's death. The thing given must, also, always be *delivered* to the donee, whether absolutely for his own benefit or upon some trust (*l*).

when not good;

It is because the transaction did not amount to a complete delivery, but was merely an order for delivery not fully carried out, being revoked by the death of the giver of the order, that a gift of a cheque, drawn by the doner on his bank, whether payable to bearer or to order, and not presented for payment till after his death (*m*), even with the delivery of his banker's pass-book to the donee (*n*), or when such cheque has not been payable till after the donor's death (*o*), or of the book of a depositor in a savings bank (*p*), or of railway debenture scrip (*q*), have been held not to be good donations mortis causâ.

(*h*) *James* v. *James*, 19 L. T. (N.S.) 809, 811, per Sir J. Stuart.
(*i*) *Seale* v. *Hayne*, 12 W. R. 239; *Longdale* v. *Longdale*, 1 Vern. 456; *Grant* v. *Grant*, 34 Beav. 626, 627; *In re Whitaker*, 21 Ch. D. 657.
(*k*) *Owen* v. *Braddell*, 7 Ir. R. Eq. 358.
(*l*) See *Ward* v. *Turner*, 2 Ves. 431, 1 Wh. & Tu. L. C. 6th ed. 1077 et seq.; *Dunne* v. *Boyd*, I. R. 8 Eq. 609; *Cross* v. *Cross*, 1 L. R. Ir. 389.
(*m*) *Hewitt* v. *Kaye*, L. R. 6 Eq. 198.
(*n*) *Beak* v. *Beak*, L. R. 13 Eq. 489; *Rolls* v. *Pearce*, 5 Ch. D. 730.
(*o*) *In re Mead*, 15 Ch. D. 654.
(*p*) *M'Gonnell* v. *Murray*, I. R. 3 Eq. 460.
(*q*) *Moore* v. *Moore*, L. R. 18 Eq. 474.

When good.

So, the subject-matter of the gift having been completely delivered to the donee, a gift of a banker's deposit note, with the view of giving the donee the whole sum secured by it (*r*), of a *promissory note, [* 410] whether indorsed or unindorsed (*s*), of a bill of exchange payable to self or order, indorsed or unindorsed (*t*), of a cheque drawn by the donor on his own bank to order, but negotiated by the donee through a foreign bank (*u*), and of a cheque payable to the donor or order, but not indorsed by him (*v*), have been held to be good donations mortis causâ.

Gift of cheque.

A gift of property which, or the security for which, passes by delivery, will be valid when delivered to the donee with the intention of giving expressed (*w*). A promissory note, or bill of exchange, or cheque payable to bearer will pass by delivery (*x*). But a cheque drawn by the donor on his own bank is nothing more than an order to his bankers as his agents to hand over the money to the donee; it is an order to obtain delivery, not the actual delivery itself (*y*). So where a man gave a cheque to another and died before, by the fault of the donee, the cheque had been cashed, it was held that the gift was incomplete (*z*); but where the donee had before the death of the donor presented the cheque for payment, and it was only through the fault of the bankers that it was not then paid, the gift was held complete because the donor and donee had done all in their power to make the gift complete, and the failure occurred merely through the fault of third parties (*a*). But the mere delivery of a bond not payable to bearer is not a complete gift (*b*).

Choses in action originally non-assignable in law.

By the common law no choses in action are assignable (*c*), except bills of exchange by the law merchant.

(*r*) *Amis* v. *Witt*, 33 Beav. 619; *Moore* v. *Moore*, L. R. 18 Eq. 474; and see *In re Mead*, 15 Ch. D. 651; *Dunne* v. *Boyd*, I. R. 8 Eq. 609.

(*s*) *Veal* v. *Veal*, 27 Beav. 303; *Clement* v. *Cheeseman*, 27 Ch. D. 631.

(*t*) *In re Mead*, 15 Ch. D. 651.

(*u*) *Rolls* v. *Pearce*, 5 Ch. D. 730.

(*v*) *Clement* v. *Cheeseman*, 27 Ch. D. 631.

(*w*) *M'Culloch* v. *Bland*, 2 Giff. 428; *Farington* v. *Parker*, L. R. 4 Eq. 116.

(*x*) 45 & 46 Vict. c. 61, ss. 31 (2), 84.

(*y*) *Hewitt* v. *Kaye*, L. R. 6 Eq. 198.

(*z*) *Tate* v. *Hilbert*, 2 Ves. Jun. 111, 4 Bro. C. C. 286.

(*a*) *Bromley* v. *Brunton*, L. R. 6 Eq. 275.

(*b*) *Stanfield* v. *Miller*, Appendix No. VIII.; and see post, pp. 453 et seq.

(*c*) 2 Bl. Com. 442; 10 Co. 48; Co. Litt. 232 b.

Some now *legally* assignable by statutes.

By different statutes the following kinds of choses in action have been made *legally* assignable. Bills of exchange, cheques, and promissory notes (*d*), indorsed bills of lading (*e*), policies of life assurance, either by indorsement, or by assignment by a separate instru-
[* 411] ment, written notice being given to the *company (*f*); policies of marine assurance by indorsement (*g*), railway (*h*) and East India bonds (*i*), and stocks, shares, mortgage, and other debentures according to the provisions of the respective Acts of Parliament by which they are created or regulated.

Judicature Act, 1873.

By the Judicature Act, 1873 (*k*), "Any *absolute assignment* by writing under the hand of the assignor (not purporting to be by way of charge only) of *any debt or other legal chose in action*, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the rights of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor."

This section does not create any new right, but merely confers a new way of enforcing old rights (*l*).

Section only includes *legal* choses in action.

Its scope is limited to "debts and other *legal* choses in action." It does not apply to *equitable* choses in action at all, however assigned.

For the section to apply in any particular case, the following three conditions must be fulfilled to make

(*d*) 45 & 46 Vict. c. 61, ss. 31, 38, 73, 83, 84.
(*e*) 18 & 19 Vict. c. 111, s. 1.
(*f*) 30 & 31 Vict. c. 144; see *Scottish Amicable Life Assurance Society* v. *Fuller*, 2 I. R. Eq. 53; *Crossley* v. *City of Gasglow Life Assurance Co.*, 4 Ch. D. 421.
(*g*) 31 & 32 Vict. c. 86; see *Lloyd* v. *Fleming*, L. R. 7 Q. B. 299; *North of England Pure Oil Cake Co.* v. *Archangel Maritime Insurance Co.*, L. R. 10 Q. B. 249.
(*h*) 8 & 9 Vict. c. 19.
(*i*) 51 Geo. 3. c. 64, s. 4.
(*k*) 36 & 37 Vict. c. 66, s. 25 (6), which came into operation on Nov. 1, 1875; see 37 & 38 Vict. c. 83, ss. 1, 2.
(*l*) *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 515.

that chose in actions assignable in law which before this Act was not so assignable (*m*):—

The subject-matter assigned must be "a debt or other *legal* chose in action." The mode must be an absolute assignment *by writing, not purporting to be [* 412] by way of charge only (*n*). Express notice in writing of the assignment must have been given to the debtor (*o*).

Voluntary release of power.

A covenant in a voluntary deed or an agreement not to exercise an equitable power operates in equity as a good release of the power (*p*). Copyrights in books (*q*) or in designs (*r*) are legally assignable by writing only.

Copyrights assignable by writing.

Power of attorney.

A power of attorney may sometimes be validly exercised after the death of the person who gave it (*s*).

Gift of right to set aside a voidable deed.

As the right to sue is incidental to the conveyance of property, and passes with it, so A., after having sold property by deed to B. by a sale voidable in equity as fraudulent, may afterwards give that property to C. By such gift, if complete in itself, A. gives to C. the right to set aside the fraudulent sale to B. (*t*).

Gift to charity.

A gift to a charity must be made in accordance with the statutes which apply to charities (*u*).

Leaseholds and real estate, how transferred.

Leaseholds must be duly assigned, and freeholds duly conveyed (*v*), by deed; and copyholds must be actually surrendered (*w*).

(*m*) See the notes to *Ryall* v. *Rowles*, 2 Wh. & Tu. L. C. 6th ed. 799 et seq.

(*n*) *National Provincial Bank* v. *Harle*, 6 Q. B. D. 626; *Burlinson* v. *Hall*, 12 Q. B. D. 347; *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511; *Ibberson* v. *Neck*, Times Rep. (1886) 411.

(*o*) *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511.

(*p*) *Isaac* v. *Hughes*, L. R. 9 Eq. 191; Farwell, Pow. 14.

(*q*) 5 & 6 Vict. c. 45; *Power* v. *Walker*, 3 M. & S. 7; *Leyland* v. *Stewart*, 4 Ch. D. 419.

(*r*) 5 & 6 Vict. c. 100; *Jewitt* v. *Eckhardt*, 8 Ch. D. 404.

(*s*) *Kiddill* v. *Farnell*, 3 Sm. & Giff. 428; see *Ex parte Pye*, 18 Ves. 140; *Lepard* v. *Vernon*, 2 V. & B. 51; *Spooner* v. *Sandilands*, 1 Y. & C. C. C. 390; and see now 45 & 46 Vict. c. 39, ss. 8, 9.

(*t*) *Dickinson* v. *Burrell*, L. R. 1 Eq. 337, 342; see *Blake* v. *Johnson*, Prec. Ch. 142.

(*u*) See 9 Geo. 2, c. 36; *Hawkins* v. *Allen*, L. R. 10 Eq. 246.

(*v*) *Dillon* v. *Coppin*, 4 My. & Cr. 647; *Bridge* v. *Bridge*, 16 Beav. 315.

(*w*) *Jefferys* v. *Jefferys*, Cr. & Ph. 138; *Tatham* v. *Vernon*, 29 Beav. 604; *Woodford* v. *Charnley*, 28 Beav. 96.

Thus in *Colman* v. *Sarrel* (*w*) Lord Thurlow said: "Where a deed is not sufficient, in truth, to pass the estate out of the hands of the conveyer, but the party must come into equity, the Court has never yet executed a voluntary agreement. To do so would be to make him who does not sufficiently convey, and his executors after his death, trustees to the person to whom he has so defectively conveyed; and there is no case where a Court of equity has ever done that."

Stocks and shares, how transferred.

[* 413] *Stocks, shares, bonds, debentures, and other securities which are not assignable at law unless duly transferred, must be duly transferred (*x*), and not merely assigned or covenanted to be transferred (*y*).

Antrobus v. *Smith.*

Thus in *Antrobus* v. *Smith* (*z*). G. C., having ten shares in the Forth and Clyde Navigation, signed the following indorsement upon the receipt for one of the subscriptions: "I do hereby assign to my daughter A. C. all my right, title, and interest of and in the inclosed call and all other calls of my subscription in the Clyde and Forth Navigation;" but kept the paper in his own possession. It was held that this indorsement was not a complete gift, and could not be enforced after his death. Sir W. Grant said:

"This instrument of itself was not capable of conveying the property. It is said to amount to a declaration of trust. Mr. C. was no otherwise a trustee than as any man may be called so who professes to give property by an instrument incapable of conveying it. He was not in form declared a trustee; nor *was that mode of doing what he proposed in his contemplation.* He meant a gift. He says, he assigns the property. But it was a gift not complete. The property was not transferred by the act. Could he himself have been compelled to give effect to the gift by making an assignment? There is no case in which a party has been compelled to perfect a gift which, in the mode of making it, he has left imperfect."

(*w*) 1 Ves. Jun. 54; and see *Attorney-General* v. *Whorwood*, 1 Ves. 535, 539.

(*x*) Ante, pp. 403, 411.

(*y*) *Witherden* v. *Jumper*, post, Appendix No. XI.; *Colman* v. *Sarrel*, 1 Ves. Jun. 50; *Ellison* v. *Ellison*, 6 Ves. 656; *Ex parte Pye*, 18 Ves. 140, 145; *Coningham* v. *Plunkett*, 2 Y. & C. C. C. 245; *Bridge* v. *Bridge*, 16 Beav. 315; *Beech* v. *Keep*, 18 Beav. 285; *Searle* v. *Law*, 15 Sim. 95; *Lambert* v. *Overton*, 13 W. R. 227; contrà, *Airey* v. *Hall*, 3 Sm. & Giff. 315; ante, pp. 389 et seq.

(*z*) 12 Ves. 39, 46.

This case was followed by *Dillon* v. *Coppin* (*a*), where a man assigned East India stock and shares in the Globe Insurance Company by a deed which was not an effectual transfer of them. Lord Cottenham said: "Indeed, as to the East India stock, the whole is to be found in the Act of Parliament, and it is clear, as to both, that the property could not be transferred by the mere operation of the deed. As to both, further acts were necessary to * transfer the legal es- [* 414] tate to others. Indeed, as to the East India stock, the deed recites that P. was about to transfer it in order to effect his intention. . . . . Here is no contract, but a deed-poll professing to assign property incapable of passing by such assignment; and the question is, whether the intended donee is entitled to the assistance of the Court to give effect to this imperfect gift." *Dillon* v. *Coppin.*

"It is not necessary to look further for this purpose than the case of *Antrobus* v. *Smith* (*b*). There the gift was in favour of a child, but it was voluntary and imperfect, and the instrument was found in the father's possession. I believe that case to have been well decided, and nothing which has since occurred affords any reason for departing from the principle upon which it is founded. . . . . It was indeed argued that the father had by that instrument made himself a trustee of the property. That argument was attempted in *Antrobus* v. *Smith* (*b*); but it failed, as it necessarily must here. So far from making himself a trustee of the stock, he states upon the instrument his intention of perfecting the gift by a transfer of the stock, and endeavours to provide the means by which the grantee may obtain the legal title" (*c*).

Thus, in *Milroy* v. *Lord* (*d*), Sir G. J. Turner, L.J., said: "I take the law of this Court to be well settled, that in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon himself. He may, of course, do this by actually transferring the property to the persons for The Court will not alter the intended mode of gift.

(*a*) 4 My. & Cr. 647, 670.
(*b*) 12 Ves. 39, supra, p. 413.
(*c*) *Ellison* v. *Ellison*, 6 Ves. 656, 662; *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84, 99.
(*d*) 4 D. F. & J. 274; ante, p. 406.

whom he intends to provide, and the provisions will then be effectual; and it will be equally effectual if he transfers the property to trustees for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol (*e*). But, in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to support an im- [*415] perfect gift. *The cases, I think, go further to this extent: that if the settlement is intended to be effectual by one of the modes to which I have referred, the Court *will not give effect to it by applying another of those modes.* If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

Imperfect gifts not upheld as *trusts* declared by settlor.

Where the donor is the actual owner both of the legal and the beneficial interest in the property, the real difficulty in this class of cases usually turns upon the question whether the donor, by his acts or words, or both, has constituted himself a *trustee* for the donees.

The gift in such cases is plainly an imperfect gift of the property according to its nature to the donees. A direct gift to the donees out and out requires a complete transfer by the donor both of his legal and of his beneficial interest in the property of his donees; whereas, to make out the donor to be a *trustee* of that property for the donees, it is only necessary to shew that while he *retains* the legal interest in the property, he has actually parted with his *present* beneficial interest in it, in favour of his donees.

Warriner v. *Rogers.*

In *Warriner* v. *Rogers* (*f*) an unmarried lady shewed A. a box in her room, which she opened and put a note inside of, and then locked and handed to him, telling him to take it into his possession, and that it would be of service to him some day, but he must not open it till after her death. She retained the key. She afterwards made her will, and gave her residuary real and personal estate to B. After her death the box was opened. In it was found a closed envelope, with a

(*e*) See post, p. 444.
(*f*) L. R. 16 Eq. 340.

paper writing inside it, written, dated, and signed by the testatrix, and addressed to A, stating in effect that the contents of the box were a deed of gift of certain real and personal estate specified therein to A. The box contained the title-deeds of a farm not mentioned in the paper writing, and some other papers also not mentioned in it. After the testatrix' death A. found another paper writing dated the day after the date of the first paper writing in the handwriting of and signed by the *testatrix and addressed to A. This [* 416] paper stated where the title-deeds of the real estate specified in the first paper writing were.

Bacon, V.C., held, following *Milroy* v. *Lord* (*g*), that the two papers were testamentary character, and therefore could not be enlarged or converted into a declaration of trust; that the donor had no intention of parting with anything at the time she signed the first paper, which was not intended to take effect until after her death; and that the second paper was plainly of a testamentary character, and nothing else.

The rule of law by which a declaration of trust by the settlor is to be tested is, in this case, thus laid down by Bacon, V.C.:

"The one thing necessary to give validity to a declaration of trust—the indispensable thing—I take it to be, that the donor or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration—should have effectually changed his right in that respect, and put the property out of his power, at least in the way of interest" (*h*).

This case was followed with approval by Sir George Jessel, M.R., in *Richards* v. *Delbridge* (*i*); in which the facts were as follows: *Richards* v. *Delbridge.*

D., the owner of leasehold premises and stock-in-trade, shortly before his death indorsed upon the lease and signed the following memorandum:—"This deed and all thereto belonging I give to E. from this time

(*g*) 4 D. F. & J. 274.
(*h*) L. R. 16 Eq. 348; but see *Richardson* v, *Richardson*, L. R. 3 Eq. 686; and *Morgan* v. *Malleson*, L. R. 10 Eq. 475.
(*i*) L. R. 18 Eq. 11; and see *Moore* v. *Moore*, L. R. 18 Eq. 474; *Lee* v. *Magrath* 10 L. R. Ir. 45, 313.

forth with all the stock-in-trade." The lease was soon after delivered by D. to E.'s mother on his behalf. D., by his will, not referring specifically to the lease and stock-in-trade, gave his property, after his wife's death, to his family.

Sir George Jessel, M.R., held that there was no valid trust declared in favour of E., and dissenting from *Richardson* v. *Richardson* (*i*) and *Morgan* v. *Malleson* (*k*), followed *Milroy* v. *Lord* (*l*) and *Warriner* v. *Rogers* (*m*), and laid down the true distinction [* 417] to *be this: "For a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift shew an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise" (*n*).

Heartley v. *Nicholson.*

In *Heartley* v. *Nicholson* (*o*), A., the owner of several shares in a colliery, wrote to his daughter, saying, "I have another present to make shortly, one share of Ryhope Colliery, and you may now consider you have this to yourself from January 2 to receive dividends upon." After attending a meeting of shareholders at which his proposal to transfer the share to his daughter was agreed to, and signing an entry to that effect (admittedly insufficient to pass the property in the share), A. wrote to his daughter to say he had made the share all right for her, and that dividends would be sent from January 2. Afterwards he inclosed her a cheque for the first dividend, and, in reply to a letter from her, wrote: "I have yours in reply to the receipt of dividend—long may you live to enjoy it;" and in the same letter told her what he had done as to the transfer of the share at the above meeting of shareholders. Subsequently, A. by his will bequeathed one share in the colliery to trustees upon certain trusts for his daughter, and devised and bequeathed his residuary estate to his sons. The daughter claimed to be absolutely entitled to another share in the colliery besides the share bequeathed to her, on the ground that A. had by his acts and words made himself a trustee of one share for her.

(*i*) L. R. 3 Eq. 686.
(*k*) L. R. 10 Eq. 475.
(*l*) 4 D. F. & J. 274.
(*m*) L. R. 16 Eq. 340.
(*n*) L. R. 18 Eq. 15.
(*o*) L. R. 19 Eq. 233; and see *Cross* v. *Cross*, 1 L. R. Ir. 389; *West* v. *West*, 9 L. R. Ir. 121.

Bacon, V.C., after pointing out that no perfect transfer was at any time made by A., but that A. intended to give, and believed he had given, the share to his daughter, proceeded to consider all the circumstances with regard to the following question,—Whether A. had by acts or words or both, in addition to, and independent of, the imperfect gift, made himself a trustee for his daughter. The test was whether or not A. had ceased to be, and his daughter had become, the beneficial owner of the share, and whether A. had retained the *legal* right to it, if any, merely in trust for her. He *held [*418] that all A. wrote and all A. did related to a gift or transfer of a nature wholly different from a trust; and, following *Milroy* v. *Lord* (*p*), his own decision in *Warriner* v. *Rogers* (*q*), and *Richards* v. *Delbridge* (*r*), held that no trust was declared in favour of the daughter of the other share.

There are two cases, however, which are entirely at variance with those just cited to prove that an imperfect or ineffectual attempt to pass the *legal* title to property *legally assignable* can never be treated as a valid declaration of trust.

The first of these cases is that of *Richardson* v. *Richardson* (*s*). There A., by a voluntary deed, assigned to B. certain specific property, and "all other her personal estate," and appointed him her attorney, to recover, receive, and give receipts for the same. At this time A. held two promissory notes, the one payable on demand to A., the other payable to A. or order (*t*). At the death of B., the assignee, the notes were found amongst his papers, but not indorsed. On the principle of *Kekewich* v. *Manning* (*u*), that an instrument intended as a present and complete assignment will be supported in equity, and may be considered to operate as a perfect declaration of trust, it was held by Lord Hatherly (then Sir W. P. Wood, V.C.) that the property in the notes passed by the deed to B., on the ground that the deed of assignment operated as a

Richardson v. *Richardson.*

(*p*) 4 D. F. & J. 274.
(*q*) L. R. 16 Eq. 340.
(*r*) L. R. 18 Eq. 11.
(*s*) L. R. 3 Eq. 686; commented on in *Warriner* v. *Rogers*, L. R. 16 Eq. 348; *Richards* v. *Delbridge*, L. R. 18 Eq. 13, 14.
(*t*) The first note, it will be observed, was not assignable at law.
(*u*) See stat. 3 & 4 Anne, c. 8. In *Blakely* v. *Brady*, 2 D. & Wal. 311, the promissory note was not assignable at law.

complete declaration of trust by A., of all her property, in favour of B.

Morgan v. *Malleson.*

In the second case—that of *Morgan* v. *Malleson* (*v*)—A. gave Dr. Morris, his doctor, the following memorandum, signed by him and attested by two witnesses: "I hereby give and make over to Dr. Morris an India bond, No. D 506, value £1000, as some token for all his very [*419] kind attention to me during illness." The *India bond, which was transferable by delivery, was kept by A. By his will A. bequeathed his residuary personal estate to charities.

Lord Romilly, M.R., held that the memorandum was equivalent to a declaration of trust in favour of Dr. Morris. If the donor had said, "I undertake to hold the bond for you," or if he had said, "I hereby give and make over the bond in the hands of A.," that would have been a declaration of trust though there had been no delivery. This amounts to the same thing.

Lord Eldon's decision in *Ex parte Pye* (*w*) was quoted in *Richardson* v. *Richardson* (*x*) as an authority for the proposition that the power of attorney was a good declaration of trust.

Ex parte Pye.

In that case the donor, wishing to purchase an annuity for a lady resident in France, authorized his agent there by writing to purchase it in her name and to draw on him for the necessary funds. The agent, finding the lady was married and also deranged, exercised his own discretion, and bought the annuity in the name of the donor. About seven months afterwards the donor sent to his agent a power of attorney to transfer the annuity into the lady's name, but died before his agent had exercised it. Lord Eldon held that the donor had made himself a trustee for the lady.

There is enough in the report to shew that the donor

(*v*) L. R. 10 Eq. 475; commented on in *Warriner* v. *Rogers*, L. R. 16 Eq. 348, 349; *Richards* v. *Delbridge*, L. R. 18 Eq. 13, 14; *Baddeley* v. *Baddeley*, 9 Ch. D. 113; and see Dav. Prec. Conv. 3rd ed. vol. 3, 689–690.

(*w*) 18 Ves. 140; and see some additional particulars in 2 Spence, Eq. Jur. 53 n. It was a cause in lunacy, the real title of which was *Ex parte Mowbray*. The Master's report of the 27th of February 1811 is the only document which is material on this point to be found among the records of the Court or the papers in the matter of the lunacy.

(*x*) L. R. 3 Eq. 686.

treated the annuity as belonging beneficially to the lady, and that he considered himself as only holding the legal interest for her benefit (*y*). And the power of attorney was evidence that he *had* constituted himself a trustee, and that he meant to give up his trusteeship and transfer the legal interest; but it is hard to see how the power of attorney itself could be taken to have *made* him a trustee, for by it he intended to get rid of the legal interest and to be no longer a trustee (*z*).

*Lord Eldon said it was not necessary to decide [*420] whether the power of attorney had been well exercised, "as *upon the documents* before me it does appear that though in one sense this may be represented as the testator's personal estate, yet he has committed to writing what seems to me a sufficient declaration that he held this part of the estate in trust for the annuitant" (*a*).

This case has been carefully examined in *Warriner* v. *Rogers* (*b*) by Bacon, V.C., who there pointed out that it fell distinctly within the principles of *Milroy* v. *Lord* (*c*), and that in *Ex parte Pye* (*d*) Lord Eldon's judgment proceeded emphatically upon the documents before him. Although there might not have been a complete transfer yet there had been a parting with the possession. The meaning and intention of the transaction was, plainly, to give the property to a person who, when she had once received it, might have done what she would with it, if she were of sound mind. The object of the power of attorney was, not to make a new gift, but to rectify the error of the agent.

Transfer by husband to wife.

Conveyances and assignments of property, whether real or personal, from a husband to his wife have been the subject of frequent and conflicting decisions.

It has for some time been doubted whether a different principle applied, when the transfer of property was made by a husband in favour of his wife, from that which applied when such transfer was made by the hus-

(*y*) See *Thorpe* v. *Owen*, 5 Beav. 224.
(*z*) See *Dillon* v. *Coppin*, 4 My. & Cr. 671; ante, p. 413.
(*a*) See *Airey* v. *Hall*, 2 Sm. & Giff. 315; *Parnell* v. *Hingston*, 3 Sm. & Giff. 337; *Kiddill* v. *Farnell*, 3 Sm. & Giff. 428, 5 W. R. 793; *Weale* v. *Olive*, 17 Beav. 252; and *Vandenberg* v. *Palmer*, 4 K. & J. 204, 214.
(*b*) L. R. 16 Eq. 350.
(*c*) 4 D. F. & J. 264.
(*d*) 18 Ves. 340.

band in favour of a stranger; whether, in fact, a transfer of property from a husband to his wife ought not to be, and was not regarded as, an exception to the general rule of law on the subject.

The ground on which it has been sought to base this exception was that, as in law a husband could not formerly convey or transfer property to his wife, so as to vest in her the legal estate of that property (*e*), he [* 421] must, therefore, be deemed to have *intended to make himself a trustee for his wife, in order to make his gift to her effectual (*f*).

Grant v. *Grant.*

In *Grant* v. *Grant* (*g*), which was a case of a gift of chattels by a husband to his wife, Lord Romilly, M.R., laid down this distinction as the ground of his decision that the husband had made himself a trustee of the chattels for his wife: "In the case of husband and wife there cannot be a delivery of a chattel, and, therefore it is impossible to give that completion to the gift that would be necessary to give effect to it between strangers. Therefore this comes under that class of cases in which it has been held that, though there is not an absolute delivery, a declaration of trust is sufficient" (*h*).

Baddeley v. *Baddeley.*

This has been followed with approval by Malins, V.C., in *Baddeley* v. *Baddeley* (*i*).

In this case a husband executed a deed poll, by which he gave certain leasehold houses and ground-rents in Middlesex to his wife, in the following terms: "I do hereby settle, assign, transfer, and set over unto my said wife, E. B., as though she were a single woman, her executors, administrators, and assigns, all that my share in [certain specified houses and ground-rents in Middlesex], as though she were now a feme sole and unmarried, and in accordance with the spirit and intention of the recent Act of Parliament entitled the Married Women's Property Act, 1870." This deed was

(*e*) Co. Litt. 187 b. *Phillips* v. *Barnet*, 1 Q. B. D. 438, 441; and see Lewin, Trusts, 8th ed. 68–69; but see now 44 & 45 Vict. c. 41, s. 50; 45 & 46 Vict. c. 75, ss. 1 (1), 2, 5; post, pp. 424, 425.

(*f*) See remarks of Hall, V.C., in *In re Breton's Estate*, 17 Ch. D. 419, 420.

(*g*) 34 Beav. 623; but see *Price* v. *Price*, 14 Beav. 598, S. C. 605.

(*h*) *Grant* v. *Grant*, 34 Beav. 624; but see the comments on this case in *In re Breton's Estate*, 17 Ch. D. 420.

(*i*) 9 Ch. D. 113.

duly registered in the Middlesex Registry, and E. B. entered into the receipt of the rents.

Malins, V.C., held this was a case where the husband had declared himself a trustee for his wife, and that her entry into possession was a taking possession of her separate property under the trust. The husband was, no doubt, mistaken in thinking he could make this gift by way of assignment, but there was enough in the deed to make it operate as a declaration of trust which the Court ought to carry out.

It will be observed that the decision here turned upon the fact *of E. B.'s entry into possession and re- [*422] ceipt of the rents, and upon the special terms of the deed poll; and did not really lay down any exception to the general rule of law in the case of a transfer between a husband and his wife (*k*)

This has been followed by Bacon, V.C., in *Fox* v. *Hawks* (*l*). A husband, about to leave England for a residence in India, at the request of his wife, who was going to stay in England, by a deed, to which he and she alone were parties, assigned a leasehold house to her, "to hold the same unto the said E. A. F., her executors, administrators, and assigns, as her separate estate," for the residue of the term. The title deeds of the house, and also the deed of assignment, were left by the husband in his wife's possession. *Fox* v. *Hawks.*

Bacon, V.C., held that the deed purported to be, and was, an assignment by the husband to his wife, for her separate use, of this property; that it was clear, from his evidence, that at the time he executed the deed he intended to make a settlement upon her; that, knowing trustees might be appointed, and refusing to name one, he chose to constitute himself the sole trustee of this deed; and that this was consistent with her afterwards requiring a power of attorney from him to enable her to deal with the house, and he declared the husband a trustee of the property for her.

It should be observed that the judgment in this case does not establish an exception to the general rule of

(*k*) See the comments on this in *Hayes* v. *Alliance Co.*, 8 L. R. Ir. 164.

(*l*) 13 Ch. D. 822; commented on in *In re Breton's Estate*, 17 Ch. D. 422.

law as to imperfect transfers of property when that transfer is from a husband to his wife. It appears to proceed entirely upon the special facts of the case, and is, it is submitted, in harmony with the general rule of law on this subject.

On the other hand, apart from the effect of the Conveyancing Act, 1881 (*l*), and of the Married Women's Property Act, 1882 (*m*), an imperfect gift from a husband to his wife has been treated in precisely the same way as if such gift had been made by one stranger to another stranger. Inasmuch as in law, till recently, a [*423] * husband could not convey or assign property to his wife, the only question that could arise in such a case was whether or not he had made himself a trustee for his wife. This question was tested by the principles laid down in *Milroy* v. *Lord* (*n*), and followed in *Richards* v. *Delbridge* (*o*), and, unless a clear intention to create such trust could be proved, the Court would not perfect an imperfect gift by making it take effect in a way not intended by the donor.

Moore v. *Moore.*

So in *Moore* v. *Moore* (*p*), Hall, V.C., held that a gift of railway scrip certificates by a husband to his wife, on which he received the dividends and paid the amount of them to her down to the time of his death, being a gift made by him to his wife in an insufficient way, through ignorance of law, could not be supported as a trust. The husband had intended a gift, and had not meant to make himself a trustee; and the question must be decided exactly in the same way as if a bill had been filed by the next friend of the wife against the husband in his lifetime.

The same principle was applied in Ireland in the case of *Hayes* v. *Alliance Co.* (*q*), where an assignment of a policy by a husband to his wife by deed poll attested by one witness was held not to be a declaration of trust, because the intention of the husband was merely to assign the policy,

In re Breton's Estate.

This principle was carefully considered, in the recent case of *In re Breton's Estate* (*r*), by Hall, V.C.

(*l*) 44 & 45 Vict. c. 41 s. 50.
(*m*) 45 & 46 Vict. c. 75.
(*n*) 4 D. F. & J. 264.
(*o*) L. R. 18 Eq. 11.
(*p*) L. R. 18 Eq. 474, 481, 482.
(*q*) 8 L. R. Ir. 149; and see *Lee* v. *Magrath*, 10 L. R. Ir. 45, 313.
(*r*) 17 Ch. D. 416.

In that case a husband, by three letters written and signed by him, and given by him to his wife, gave her certain furniture and other articles for her own use and benefit. The furniture and other articles were placed in the house they jointly occupied up to the time of his death, and were used in the ordinary way. By his will he bequeathed his residuary estate on certain trusts.

Hall, V.C., after commenting on the cases on the subject, pointed out that the principle laid down in *Milroy* v. *Lord* (*r*),* and followed by Sir G. Jessel, [* 424] M.R., in *Richards* v. *Delbridge* (*s*), was applicable to every case of a gift, without any exception as to a gift from husband to wife. That principle was that, if a gift was intended to take effect by transfer, the Court would not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust; and it was clear that it was not the purpose or intention of the husband, in writing these letters, to constitute himself a trustee for his wife.

The true view, it is submitted, is that followed by Hall, V.C.—namely, that imperfect gifts between husband and wife must be tested in the same way as imperfect gifts between two strangers.

In consequence, however, of recent statutory changes, these conflicting decisions have become much less important.

By the Conveyancing Act, 1881 (*t*), which applies only to conveyances executed after December 31, 1881, *freehold land*, or a *thing in action*, may be conveyed by a husband to his wife and by a wife to her husband, alone, or jointly with another person. Conveyancing Act, 1881.

So far as a gift from husband to wife or from wife to husband is of property within this Act, this question cannot arise with respect to it, as the conveyance will, by virtue of the Act, effect a complete transfer of the property comprised in it.

By the Married Women's Property Act, 1882 (*u*),

(*r*) 4 D. F. & J. 264. (*s*) L. R. 18 Eq. 11.
(*t*) 44 & 45 Vict. c. 41, ss. 1 (2), 50.
(*u*) 45 & 46 Vict. c. 75, ss. 1 (1), 2, 5, 25; see Griffith, 5th ed. 3, 4, 77.

Married Women's Property Act, 1882.

which came into operation on January 1, 1883, every woman, whenever married, may after December 31, 1882 (*u*), acquire *any* real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee.

The principles laid down in *Milroy* v. *Lord* (*v*), and followed in *Richards* v. *Delbridge* (*w*) and in *In re Breton's Estate* (*x*) according to which gifts between hus- [* 425] band and wife are tested in * the same way as gifts between two strangers, will now, it is conceived, always apply.

Covenant to transfer, and hold on trust meanwhile.

Inasmuch as the Court looks in each case to what is proved to have been the real intention of the parties, it follows that a voluntary instrument may operate *both* as an imperfect assignment and as a valid declaration of trust.

So where a man entered into a voluntary covenant to surrender copyholds, and in the meanwhile to stand possessed of them for trustees for the volunteers, it was held that though the covenant could not per se be enforced, yet a valid trust was constituted for the volunteers (*y*).

Legal title vesting in donee afterwards of no avail.

It makes no difference that the donee, by becoming at the death of the donor his personal representative, has been enabled himself to perfect the imperfect assignment (*z*). The nature of the assignment cannot be altered after the death of the donor.

Donor the *equitable* owner with power to obtain transfer of legal estate.

II. The second division (*a*) consists of cases in which the doner is only the *equitable* owner, but can obtain a transfer of the legal estate, either to his donees directly, or to trustees for them ; and intends to do so.

In this class of cases the gift is of course complete so soon as the donor has actually conveyed, transferred, or assigned, as the case may require, his equitable interest

(*u*) See Griffith, 5th ed. 14.
(*v*) 4 D. F. & J. 264.
(*w*) L. R. 18 Eq. 11.
(*x*) 17 Ch. D. 416.
(*y*) *Steele* v. *Waller*, 28 Beav. 466 ; *Markwell* v. *Markwell*, 34 Beav. 12, 14.
(*z*) *Dillon* v. *Coppin*, 4 My & Cr. 647 ; and see *Strong* v. *Bird*, L. R. 18 Eq. 315.
(*a*) Ante, p. 406.

in the property, whether real or personal, to the donees; *and* has also procured a transfer of the legal estate in his trustees, either to the donees, or to trustees for them.

So where a transfer of stock has been actually made into the names of the trustees, and trusts have been declared, the trustees will be compelled to perform the trusts (*a*), even though the trust property by accident gets back into the hands of the donor (*b*), * to [* 426] whom the trustees cannot transfer it without a breach of trust (*c*).

In *Bridge* v. *Bridge* (*d*), the property the subject of the voluntary settlement consisted of certain real estate, shares in companies, foreign bonds (transferable by delivery), consols, and cash at a bank. The legal estate in all this property was at the date of the settlement vested in the trustees and executors of the settlor's uncle's will, upon trust to apply the interest for his benefit till he was twenty-five, when he was to be put into possession of the estates, and the money was to be paid over to him. The settlor, when twenty-two years of age, by a voluntary deed conveyed all his interest in the real estate to A. and B., to hold to the use of himself and A. and B. and their heirs upon trust to sell. He directed that the produce and personal estate and effects transferred or to be transferred into the names of the trustees should thenceforth be, and be considered, vested in himself, A., and B., on certain trusts for himself and his children. The deed also contained a covenant for further assurance. The shares were transferred by the executors to the trustees of this deed shortly after its execution, but the consols and cash remained in the names of the executors, and the foreign bonds remained in their custody. *Bridge* v. *Bridge*.

(*a*) *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84, 99; *Attorney-General* v. *Whorwood*, 1 Ves. 535, 539; *Bill* v. *Cureton*, 2 My. & K. 503; *Dilrow* v. *Bone*, 3 Giff. 538; *Jeffreys* v. *Jeffreys*, Cr. & Ph. 138; *Muggeridge* v. *Stanton*, 7 W. R. 638; *Milroy* v. *Lord*, 4 D. F. & J. 264 infra.

(*b*) *Ellison* v. *Ellison*, 6 Ves. 656, notes to 1 Wh. & Tu. L. C. 6th ed. 302; *Smith* v. *Lyne*, 2 Y. & C. C. C. 345; *Wheatley* v. *Purr*, 1 Keen, 551; *Browne* v. *Cavendish*, 1 J. & Lat. 637; and see *Rycroft* v. *Christy*, 3 Beav. 238, 242; post, p. 445.

(*c*) *M'Donnell* v. *Hesilrige*, 16 Beav. 346.

(*d*) 16 Beav. 315; but see Sug. V. & P. 14th ed. 719, and Dav. Prec. Conv. 3rd ed. vol. 3, 693; *In re King*, 14 Ch. D., per Hall, V.C., 184.

Lord Romilly, M.R., held that the true construction of the deed was that, until the transfer of the legal interest in the choses in action to the trustees of the deed took place, the relation of trustee and cestui que trust did not arise, and that until it did arise the gift was only imperfect, and one which the Court would not interfere to complete or create; and that, as to the personal estate, the settlement was only effectual with regard to the shares, which had been transferred by deed to the trustees of the deed. With regard to the real estate, he held that, as at the time of the settlement the settlor had merely an equitable interest, and the settlement could not then operate as a conveyance of the legal estate, no estate passed to the trustees under the deed, which was so far inoperative. It could not oper- [* 427] ate as a declaration of trust, * because it did not purport to make the trustees of the will trustees to the donees under the settlement.

Beech v. *Kelp.*

The principles upon which *Bridge* v. *Bridge* (*e*) was decided by Lord Romilly, M.R., were adhered to by him in the subsequent case of *Beech* v. *Keep* (*f*). In that case consols, belonging beneficially to A. for life, with remainder to B. absolutely, stood in the names of two trustees, of the survivor of whom B. was the sole executrix. The consols remained in the names of the two trustees after their deaths, but B., as sole executrix, received the dividends and paid them over to A. B., after the death of the two trustees, by a voluntary deed assigned all her reversionary interest in the consols to A., "to the end and intent that he might become present and absolute owner thereof," and A. executed a release of even date to B. of all claims. B. subsequently refused to execute a power of attorney to transfer the consols to A.

Lord Romilly, M.R., held, following *Bridge* v. *Bridge* (*f*), that this was a case in which the relation of trustees and cestui que trust had not been created It must, he said, be regarded as if the interest had been present instead of reversionary; it was a case where the whole legal interest was vested in the defendant (B.) subject to the life interest of the plaintiff (A.). The voluntary deed was merely an incomplete assignment which might and ought to have been perfected by the transfer of the consols, if both parties had been

(*e*) 16 Beav. 315.
(*f*) 18 Beav. 285; see Sug. V. & P. 14th ed. 719.

willing to complete the transaction, and which then would have been a complete transfer. It was clear, he said, from the statements in the bill that some further act was considered by both parties to be necessary to carry into effect the intention of the defendant, and to give the plaintiff the absolute interest in the stock.

The case of *Bridge* v. *Bridge* (*g*) has been doubted by Lord St. Leonards (*h*), so far as it decides that the conveyance of an equitable estate in real property to volunteers is invalid.

*Lord Hatherley (then Sir W. P. Wood, V.C.), [*428] in *Gilbert* v. *Overton* (*i*), also commented on this decision.

In *Gilbert* v. *Overton* (*k*), a settlor, holding an agreement for a lease subject to rents and covenants, by a voluntary deed assigned all his interest to trustees to hold upon the trusts thereby declared, and shortly after, under the agreement, took a lease to himself. It did not appear whether at the date of the settlement the settlor was entitled to claim an immediate lease. The legal estate was never assigned to the trustees. It was held that the settlement was complete, and ought to be executed. *Gilbert* v. *Overton.*

Here there was nothing to shew that the settlor intended to obtain the transfer of the legal interest to the trustees at the time of the settlement, even if he had the power of doing so (*l*); or, in fact, that he had not done by the settlement all that it was in his power to do to pass the legal estate in the property. But in *Bridge* v. *Bridge* (*g*) it appeared that the settlor intended to obtain a transfer of the legal estate to the trustees of the deed of gift; so that, until that was actually done, the settlor had not done all that it was in his power to do to complete his gift according to his intention. This decision is, in fact, an extension of the doctrine of *Antrobus* v. *Smith* (*m*) to cases in which the donor, though merely the equitable owner, had the

(*g*) 16 Beav. 315.
(*h*) Sug. V. & P. 14th ed. 719; and see Dav. 3rd ed. vol. 3, 693; and *In re King*, 14 Ch. D., per Hall, V.C., 184.
(*i*) 2 H. & M. 116.
(*k*) 2 H. & M. 110; post, p. 439.
(*l*) See 2 H. & M. 116; and see *Dillon* v. *Coppin*, 4 My. & Cr. 671, as to the intention of perfecting a gift by transfer.
(*m*) 12 Ves. 39; ante, p. 413.

power to vary, and attempted to vary, the legal title. "The true construction of the deed," said Lord Romilly, M.R., (*n*), in *Bridge* v. *Bridge* (*o*), "seems to me to be, that until that transfer took place the relation of trustee and cestui que trust was not to arise, and that until it did arise it was only an imperfect gift, which this Court would not interfere to complete or create" (*p*).

It will also be observed that in *Bridge* v. *Bridge* (*o*), the deed contained a covenant for further assurance, and an agreement to transfer the personal estate; and that the executors of the will did, in pursuance of this [*429] agreement, transfer to the trustees of the *deed certain shares while the settlor was under the age of twenty-five years. The suit, moreover, was not begun till after the settlor had attained that age when he had become entitled to the legal estate of both the personal and the real estate. These facts, it is conceived, shew that the settlor had not, except as to the shares, done all that he could to transfer or procure a transfer of the legal estate in the property settled.

In *Gilbert* v. *Overton* (*q*), Lord Hatherley (then Sir W. P. Wood, V.C.), said: "I do not wish to say more as to *Bridge* v. *Bridge* (*o*) than this: that the point there dealt with will require much consideration. A man who conveys his equitable interest may well be considered to do all that can be required, and it would be a great extension of the established doctrine on these subjects to hold that if a legal estate is discovered, perhaps many years afterwards, to have been outstanding at the date of a voluntary settlement, the settlement itself is to be deprived of effect. Where a settlor by a voluntary instrument conveys all his interest, it may well be held that, if that interest proves to be merely equitable, the assignee becomes entitled to claim a conveyance of the legal estate from the person in whom it may be vested."

This, it is conceived, cannot apply in cases where the settlor intended and attempted to obtain a transfer of the legal interest, for he would hardly attempt or intend to deal with a legal estate of which he was ignorant. The decisions in *Bridge* v. *Bridge* (*o*), and *Beech* v. *Keep* (*r*) are expressly confined to cases in which the

(*n*) 16 Beav. 326.
(*o*) 16 Beav. 315.
(*p*) See *M'Donnell* v. *Hesilrige*, 16 Beav. 348.
(*q*) 2 H. & M. 116.
(*r*) 18 Beav. 285.

settlor *intended* and ineffectually attempted to pass the legal interest, and are not really opposed to any other cases.

Woodford v. *Charnley*.

In *Woodford* v. *Charnley* (*t*) A. was the mortagee in fee of freeholds conveyed to her to secure £5000 and interest. The deed contained *no covenant* for payment of the £5000. A. by a voluntary deed assigned the sum of £5000 to trustees upon certain trusts for herself and children, and gave them a power of attorney to recover it. *The legal estate in the freeholds remained in A.*

Difference between cases where owner of equitable estate controls, and where he has *legal* estate.

*It was held that, as in order to recover the [*430] money the legal estate must be reconveyed, and as there was no means of obtaining a reconveyance of the legal estate from the settlor to the owner, the settlement was incomplete, and could not be enforced.

It will be observed that the class of cases in which the donor is merely the equitable owner, but can control the legal estate (though vested in trustees) so as to vest it in new trustees for his donees, differs from the class of cases in which the doner has *himself* the legal estate as well as the equitable interest in one inportant respect.

True test the intention of settlor at the time.

In the former class of cases of imperfect legal transfer, the property is already the subject of a trust, and the Court can therefore deal with the beneficial interest as merely an equitable interest—subject always to this qualification, that the Court will not for a mere *volunteer* alter the intended mode of assignment (*u*).

The test in all such cases seems to be, what was the real intention of the settlor at the time he executed the voluntary settlement? Did he intend to make a legal transfer, or did he merely intend an equitable assignment, or did he mean a declaration of trust? (*v*).

Whether the property is to be transferred direct to the volunteers, or to trustees for them, in each case the legal title must be validly transferred, according to the nature of the property, so as to fully carry out the intention of the settlor; and if that has not been fully

(*t*) 28 Beav. 96.
(*u*) Ante, pp. 406, 407, 415; post, p. 439.
(*v*) Ante, p. 404.

carried out, the ineffectual transfer will not be upheld by the Court as a declaration of trust (*w*).

Resulting trust to settlor.

But even where the property has been completely transferred to, and well vested in, the trustees, a further question remains. Has a binding trust of the whole or any part of the property been declared sufficient to rebut the resulting trust in favour of the donor? (*x*)

So the absence of words of limitation in a voluntary [*431] settlement *of real estate has been held to create a resulting trust in favour of the settlor (*y*). But a memorandum by B. on the title deeds of an estate, "I give Blackacre to A," and a subsequent conveyance by B. of that estate to A. by a general description, if B. has no intention to change the previous gift, would pass the property to A., and not create a resulting trust in favour of B. (*z*). So a voluntary settlement of property duly assigned to trustees upon trusts which could arise only on an event which could never occur creates a resulting trust in favour of the settlor (*a*).

Locus pœnitentiæ.

And where a person desiring to settle stock caused it to be transferred to trustees, and approved a draft declaration of trust, it was held that there was a locus pœnitentiæ, and that the trusts did not attach, unless the draft had been formally authorized before the transfer to the trustees (*b*).

Does transferee take beneficiary or on trust?

Closely connected with this is the question whether the transferee takes the property beneficially, or takes it impressed with a trust (*c*).

(*w*) *Tate* v. *Hilbert*, 4 Bro. C. C. 286; *Patterson* v. *Williams*, Ll. & G. (t. Pl.) 95; *Hewitt* v. *Kaye*, L. R. 6 Eq. 198, *Weale* v. *Ollive*, 17 Beav. 252; *Hogarth* v. *Phillips*, 4 Drew. 360; *In re Shield*, 53 L. T. (N.S.) 5. See cases infra.

(*x*) See Lewin, Tr. 8th ed ch. 9; Elphinstone, Deeds, ch. 20.

(*y*) *Middleton* v. *Barker*, 29 L. T. (N.S) 643.

(*z*) *Strong* v. *Bird*, L. R. 18 Eq. 318.

(*a*) *Pawson* v. *Brown*, 13 Ch. D. 202; ante, p. 334.

(*b*) *Re Sykes' Trusts*, 2 J. & H. 415; *Coningham* v. *Plunkett*, 2 Y. & C. C. C. 245; and see *Muggeridge* v. *Stanton*, 7 W. R. 638; *Penfold* v. *Mould*, L. R. 4 Eq. 562. See also *Roberts* v. *Roberts*, 15 W. R. 117; and *James* v. *James*, 19 L. T. (N.S.) 809.

(*c*) Lewin, Tr. 8th ed. ch. 9; and see, as to precatory trusts under wills, *Lloyd* v. *Chune*, 2 Giff. 441; *Jones* v. *Badley*, L. R. 3 Ch. 362; *M'Cormick* v. *Grogan*, L. R. 4 H. L. 82; *In re Boyes*, 26 Ch. D. 531; Jarman, 4th ed. 388; Theobald, 3rd ed. 354 et seq.

This question was carefully considered by Sir G. Jessel, M.R., in *Strong* v. *Bird* (*d*). *Strong* v. *Bird.*

The facts in that case were as follows:—A. borrowed £1100 from his stepmother, then living in his house, and paying him £212 10*s.* each quarter for her maintenance, on an agreement to repay it by a deduction of £100 from each quarter's payment. In pursuance of this agreement £100 was, for each of the first two quarterly payments after the agreement, deducted by A.'s stepmother. After this, according to the evidence of A. and his wife, corroborated by memoranda in the handwriting of his * stepmother on the counter- [* 432] foils of the cheques drawn by her. she refused to make further deductions; and henceforth up to the time of her death, which occurred more than nine quarters afterwards, she paid A. the full quarterly sum. By her will she appointed A. her sole executor, but made no disposition of her residuary personal estate.

The question was, whether the sum of £900 was a gift to A., or whether that sum was due from him to the estate and there was a trust of it in favour of his stepmother's next of kin.

Sir G. Jessel, M.R., said the law required that, in a case where the thing which is subject of donation is transferable or releasable at law, the legal transfer or release should take place; and that till that change had taken place the gift was not perfect. The donor by her will had appointed the alleged donee executor. After her death he proved the will, and the legal effect of that was to release the debt in law, and therefore the condition required—namely, that the release should be perfect at law—was complied with by the testatrix making him executor. It was not necessary that the legal change should knowingly be made by the donor with a view to carry out the gift. It might be made for another purpose; but if the gift was clear, and there was to be no recall of the gift, and no intention to recall it, so that the person who executed the legal instrument did not intend to invest the person taking upon himself the legal ownership with any other character, there was no reason why the legal instrument should not have its legal effect. The debtor would be liable in a Court of equity, unless he could shew some reason for not being made Continuing intention to give.

(*d*) L. R. 18 Eq. 315; and see *Bottle* v. *Knocker*, 46 L. J. (N.S.) Ch. 159.

liable. In this case there was proved a *continuing intention* to give. There being the *continuing intention* to give, and there being a legal act which transferred the ownership or released the obligation—for it was the same thing—the transaction was perfected, and the debtor did not require the aid of a Court of equity to carry it out, or make it complete.

So in *Standing* v. *Bowring* (*e*), where A. transferred stock into the joint names of herself and B., and re-
[* 433] ceived the dividends thereon, * but did not inform B. of this transfer, it was held, upon an application by A., two years afterwards, for a retransfer of the stock into her sole name, that as upon the evidence A. appeared to have made this transfer for the express purpose of benefiting B., and with the intention that B. should have the stock absolutely if he survived her, the Court could not compel a retransfer by B.

The general rule is that a complete transfer of property by a voluntary donor, which is effectually vested in trustees for his donees, is irrevocable (*f*).

To this rule the following class of cases forms an important exception:—

Assignments to trustees for payment of debts.

It has been established by a series of decisions that a legal assignment or transfer by a debtor of his property to trustees on trust for the payment of his *debts*, without the knowledge or concurrence of his creditors, is revocable by him (*g*).

The principle upon which these decisions proceed is that such a deed is to be construed as a mandate by the debtor to the trustees; it does not create any equitable or legal right in favour of a particular creditor; of itself it does not create a trust in favour of all and every or any of the creditors (*h*). So where the Crown by warrant "grants" booty of war to an officer of State "in trust" to distribute among certain persons found to be entitled thereto, such warrant does not operate as

(*e*) 27 Ch. D. 341, S. C. 31 Ch. D. 282; and see *Fowkes* v. *Pascoe*, L. R. 10 Ch. 343.

(*f*) Ante, p. 405; post, pt. v. ch. iv.

(*g*) *Walwyn* v. *Coutts*, 3 Mer. 707, S. C. 3 Sim. 14; *Garrard* v. *Lord Lauderdale*, 3 Sim. 1, S. C. 2 Russ. & My. 451; *Acton* v. *Woodgate*, 2 My. & K. 495; *Henriques* v. *Bensusan*, 20 W. R. 350; *Glegg* v. *Rees*, L. R. 7 Ch. 71; *Johns* v. *James*, 8 Ch. D. 744.

(*h*) *Johns* v. *James*, 8 Ch. D. 749, 750, per James, L.J.

a transfer of property or create a trust; it merely makes that officer of State the agent of the Crown to distribute the fund (*i*). It is merely a direction to the trustees as to how they shall deal with the estate for the benefit of the *owner*, and, so long as the creditors have not executed the deed or been made aware of and assented to it, the owner may revoke, alter, or modify the trusts at his own pleasure, or call for a retransfer of the property (*k*).

Distinction between trusts generally and trusts to pay *debts*.

* The distinction between trusts for the [* 434] benefit of creditors and trusts for the benefit of mere donees was clearly pointed out by Sir G. J. Turner, L.J., in *Smith* v. *Hurst* (*l*), as follows:—

"In cases of trusts for the benefit of particular persons the party creating the trust can have no other object than to benefit the persons in whose favour the trust is created, and, the trust being well created, the property in equity belongs to the cestuis que trust as much as it would belong to them at law if the legal interest had been transferred to them; but in cases of deeds purporting to be executed for the benefit of creditors, and to which no creditor is a party, the motive of the party executing the deed may have been either to benefit his creditors or to promote his own convenience; and the Court therefore has to examine into the circumstances for the purpose of ascertaining what was the true purpose of the deed; and this examination does not stop with the deed itself, but must be carried on to what has subsequently occurred, because the party who has created the trust may, by his own conduct, or by the obligations which he has permitted his trustee to contract, have created an equity against himself" (*m*).

In such trusts the settlor is the only cestui que trust (*n*), and therefore may do what he likes with the fund (*o*). The deed operates merely as a *power* to the trustees (*p*), so that the revocatory power of the donor

(*i*) *Kinloch* v. *Secretary of State for India in Council*, 15 Ch. D.1.
(*k*) *Smith* v. *Hurst*, 10 Hare, 30; and see Lewin, Tr. 8th ed. ch. 20, s. 2; notes to *Ellison* v. *Ellison*, 1 Wh. & Tu. L. C. 6th ed. 303 et seq.
(*l*) 10 Hare, 30.
(*m*) See also as to the distinction, per Sir E. Sugden in *Simmonds* v. *Palles*, 2 J. & Lat. 489, 504; *Johns* v. *James*, 8 Ch. D. 749, 750.
(*n*) *Bill* v. *Cureton*, 2 My. & K. 503, 511, et supra.
(*o*) *Hogarth* v. *Phillipps*, 28, L. J. (N.S.) Ch. 195.
(*p*) *Smith* v. *Keating*, 6 C. B. 136; *Johns* v. *James*, 8 Ch. D. 749.

extends not only to *varying* the trusts (*q*), but it is like putting money into the hands of an agent for a specail purpose; the money and authority can be recalled at pleasure until they have been acted on (*r*).

Rights of creditors under such deeds.

As such a deed is regarded merely as an arrangement for the convenience of the assignor and assignee, the assignee undertaking the agency of the affairs of the [* 435] assignor, it follows upon principle * that, in such a case, no creditor can take advantage of the deed unless it has been communicated to him (*s*).

So, until such communication, the deed will not be enforced at the suit of creditors claiming under it (*t*), or against the personal representatives of the debtor after his death (*u*), or as against the trustees (*v*), much less against creditors prejudiced by it (*w*).

When deed becomes irrevocable.

From the time the deed has been communicated to a creditor, a valid trust is created in his favour, and the relation between the debtor and the trustee ceases to be that of mere principal and agent. Such communication may be proved by the creditor having executed the deed (*x*), by his having acted upon the faith of it (*y*), or been a party and privy to it (*z*), and of course by its contents having been communicated to him (*a*).

Deed may be irrevocable as to *some* creditors only.

The creditor to whom the communication is made alone derives any right under the deed from that fact; it does not enure for the benefit of any other person or persons to whom no such communication has been made (*b*).

(*q*) This is all that Lord Eldon decided in *Walwyn* v. *Coutts*, 3 Mer. 707, and Sir J. Leach in *Acton* v. *Woodgate*, 2 My. & K. 492.

(*r*) *Smith* v. *Hurst*, 10 Hare, at p. 47.

(*s*) *Synnot* v. *Simpson*, 5 H. L. C. 121; *Glegg* v. *Rees*, L. R. 7 Ch. 71; *Johns* v. *James*, 8 Ch. D. 744.

(*t*) *La Touche* v. *Earl of Lucan*, 7 Cl. & F. 772.

(*u*) *Garrard* v. *Lauderdale*, 3 Sim. 1; *Re Sander's Trusts*, 47 L. J. (N.S.) Ch. 667.

(*v*) *Wilding* v. *Richards*, 1 Coll. 655.

(*w*) *Smith* v. *Hurst*, 10 Hare, 30.

(*x*) *Glegg* v. *Rees*, L. R. 7 Ch. 71; *Johns* v. *James*, 8 Ch. D. 750.

(*y*) *In re Baber's Trusts*, L. R. 10 Eq. 554; *Johns* v. *James*, 8 Ch. D. 750.

(*z*) *Mackinnon* v. *Stewart*, 1 Sim. (N.S.) 89; *Field* v. *Donoughmore*, 1 Dru. & War. 227; *Walwyn* v. *Coutts*, 3 Mer. 707, S. C. 3 Sim. 14; *Garrard* v. *Lord Lauderdale*, 3 Sim. 1, S. C. 2 Russ. & My. 451.

(*a*) *Harland* v. *Binks*, 15 Q. B. 713; *Johns* v. *James*, 8 Ch. D. 750.

(*b*) *Griffith* v. *Ricketts*, 7 Hare, 307; *Johns* v. *James*, 8 Ch. D. 750.

If the debtor transfers his property to a creditor as trustee, it seems that, unless the trustee dissents, the deed is, as to that creditor only, irrevocable (*c*).

But the trust cannot be revoked by the settlor so as to defeat or interfere with any act of the trustee in carrying out the trust before its revocation (*d*). So, too, the assignee may in execution of the trusts take steps as against third parties (*e*), though not against the assignor, so long as the trust remains revocable.

Of course, the fact that the trusts have [436] been acted upon, or at least communicated to the creditors, will not be enough if the trusts were merely intended to establish an agency, and to be revocable (*f*).

Principle not applied to any other class of cases.

This principle has never been applied to any cases other than arrangements for the payment of creditors. Thus it has never been applied as between the settlor and persons who are purely the objects of his bounty; the trustees under a voluntary trust have never been regarded as standing in the position of agents of the debtor (*g*).

Such deed an act of bankruptcy.

Such a deed, however, whether it is communicated to the creditors or not, is an act of bankruptcy, either if it is for the benefit of the creditors generally and comprises all the debtor's property (*h*); or under the Bankruptcy Act, 1883 (*i*), if it comprises only a part of his property, but is a fraudulent preference.

Analogous case of revocable trusts.

Notwithstanding the distinction above referred to, there are cases of imperfect gifts for the benefit of particular persons which are treated in the same manner as trusts for creditors (*k*), upon the ground that

(*c*) *Siggers* v. *Evans*, 5 Ell. & B. 367; *Acton* v. *Woodgate*, 2 My. & K. 495; *Hobson* v. *Thelluson*, L. R. 2 Q. B. 648, 649; *Re Sander's Trust*, 57 L. J. (N.S.) Ch. 647; *Johns* v. *James*, 8 Ch. D. 744.

(*d*) *Wilding* v. *Richards*, 1 Coll. 655, 659; and see *Kirwan* v. *Richards*, 5 Hare, 493.

(*e*) *Glegg* v. *Rees*, L. R. 7 Ch. 71.

(*f*) *Cornthwaite* v. *Frith*, 4 De G. & S. 552; and see *Malcolm* v. *Scott*, 3 Hare, 39, 46.

(*g*) *Paterson* v. *Murphy*, 11 Hare, 90, 91; and see *Synnot* v. *Simpson*, 5 H. L. C. 141.

(*h*) *Brittain* v. *Brown*, 24 L. T. (N.S.) 504; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 4, 6; Robson, 5th ed. 154 et seq.; ante, pp. 94 et seq.

(*i*) 46 & 47 Vict. c. 52, s. 4 (1) C.

(*k*) See also *Synnot* v. *Simpson*, 5 H. L. C. 121, 138–9; *Montefiore* v. *Brown*, 7 H. L. C. 241, 266.

the *intention* of the donor was not to create a trust, but merely to make a private arrangement for his own convenience, and nothing else.

In *Hughes* v. *Stubbs* (*l*) A. drew a cheque on her bankers, which she gave to B. with verbal directions to apply it for the benefit of C. in increasing the value of a legacy given by A.'s will to C. The bankers gave B. credit for the amount of the cheque. A. died afterwards. In a suit to administer A.'s estate it was held that as "a person not intending to give or to part with the dominion over his property may retain such dominion, notwithstanding he may have vested the property [* 437] in trustees and *have declared a trust in favour of third persons" (*m*), the trust was revocable, that no present interest was conferred on C., and that A. did not part with any present interest in the sum in question or create any trust for the legatee (*n*).

Same principle at law.

So also at law, where a sum of money was paid by A. into the hands of B. for the benefit of a third person, it was held to be a countermandable gift, and that A. might recover it back by an action for money had and received so long as it remained in B.'s hands (*o*).

(*l*) 1 Hare, 476; and see *Maguire* v. *Dodd*, 9 Ir. Ch. Rep. 452, 457.

(*m*) *Walwyn* v. *Coutts*, 3 Sim. 14, and other cases supra.

(*n*) See the comments on this case in *Paterson* v. *Murphy*, 11 Hare, 91-92; and see *Gaskell* v. *Gaskell*, 2 Y. & J. 502; *Smith* v. *Warde*, 15 Sim. 56; *Vandenberg* v. *Palmer*, 4 K. & J. 214, 218; *Pedder* v. *Mosely*, 31 Beav. 159; *Field* v. *Lonsdale*, 13 Beav. 78.

(*o*) *Taylor* v. *Lendey*, 9 East, 49; and see *Williams* v. *Everitt*, 14 East, 582; *Scott* v. *Perchor*, 3 Mer. 652; *Malcolm* v. *Scott*, 3 Hare, 39.

GIFTS OF EQUITABLE INTEREST INTER VIVOS.

Gifts of equitable interests *alone*.

CASES in which the donor, whether he is in fact the legal and equitable owner or merely the equitable owner of the property, *intends* only to confer on his donees his *equitable* interest in that property.

This class of cases really consists of two kinds.

Donor, the *legal* owner, converts himself into a trustee.

I. Cases in which the donor is *both* the legal and the equitable owner of the property (*p*).

In these cases the donor can only effect his object in one way. He must declare himself a trustee of that property for his donees; so that while he retains the legal interest in the property, he holds the beneficial interest in it, from the time of that declaration, in trust for the objects of his bounty.

As soon as he has declared himself trustee of the property for his donees, nothing more need be done by him. The gift is complete, and it will be enforced against him or his representatives, and all persons claiming under him (*q*), except, of course, subsequent purchasers from him where the property given is within 27 Eliz. c. 4 (*r*).

Same principle applies to *all* kinds of property.

Similarly, if the donor has only an equitable interest (*s*), or if his property is incapable of legal transfer (*t*),

(*p*) Post, pp. 445 et seq.

(*q*) *Ellison* v. *Ellison*, 6 Ves. 656, 662; *Ex parte Pye*, 18 Ves. 140; *Drosier* v. *Brereton*, 15 Beav. 221; *Searle* v. *Law*, 15 Sim. 95; *Bridge* v. *Bridge*, 16 Beav. 321; *M'Fadden* v. *Jenkyns*, 1 Hare, 460–1; *Meek* v. *Kettlewell*, 1 Hare, 470–1, S. C. 1 Ph. 342; *Steele* v. *Waller*, 28 Beav. 466; *Gray* v. *Gray*, 2 Sim. (N.S.) 273; *Wilcocks* v. *Hannyngton*, 5 Ir. Ch. Rep. 38; *Wheatley* v. *Purr*, 1 Keen, 551; post, pt. v. ch. iv.

(*r*) Ante, pp. 187 et seq.

(*s*) *Meek* v. *Kettlewell*, 1 Hare, 470–1, S. C. 1 Ph. 342; *Paterson* v. *Murphy*, 11 Hare, 88; *Richardson* v. *Richardson*, L. R. 3 Eq. 686; *Parker* v. *Stones*, 38 L. J. (N.S.) Ch. 46.

(*t*) *Vernon* v. *Valden*, MS. 1722–3, post, Appendix No. VI.; *Meek* v. *Kettlewell*, 1 Hare, 474–6, S. C. 1 Ph. 342; *Collinson* v. *Patrick*, 2 Keen, 123; post, pp. 453 et seq.

[*439] he can *convert* *himself into a trustee by merely declaring himself a trustee of that interest or property for his donees (*u*) ; and it has been decided that a man may convert himself into a trustee of the title deeds of land held by him as security for a debt, the debtor being at the same time made a trustee of the debt for the same cestuis que trust (*v*).

What is a sufficient declaration of trust.

The difficulty in this class of cases is to determine what constitutes a sufficient declaration of trust by the donor.

The following well-established principle must be carefully borne in mind in the consideration of the various cases in which it has been held that the donor had or had not declared himself a trustee for his donees.

Court does not perfect an imperfect gift.

The Court will not in the case of *voluntary* instruments, unless the donor be clearly proved to have intended it (*w*), uphold a settlement upon the ground that the donor has declared himself trustee, if the donor intended to *transfer* that property to his donees. The Court will not perfect an imperfect gift by rendering it effectual in a way the donor did not contemplate (*x*).

Question merely whether donor has taken effectual steps.

The question, therefore, becomes narrowed to this one. Assuming that the donor *intended* to convert himself into a trustee for his donees, has he taken effectual steps for this purpose.

What declaration of trust must be.

The one indispensable condition for a valid declaration of trust by the donor has been clearly laid down by Bacon, V C., in *Warriner* v. *Rogers* (*y*), followed by Sir G. Jessel, M.R., in *Richards* v. *Delbridge* (*z*), to be this :

The donor must so deal with his property at the time he converts himself into a trustee as entirely to deprive

(*u*) See Lewin, Trusts, 8th ed. 68.

(*v*) *Parker* v. *Stones*, 38 L. J. (N.S.) Ch. 46.

(*w*) *Milroy* v. *Lord*, 4 D. F. & J. 264 ; *Richards* v. *Delbridge*, L. R. 18 Eq. 11 ; *Lee* v. *Magrath*, 10 L. R. Ir. 45, 313 ; *In re Shield*. 53 L. T. (N.S.) 5 ; ante, p. 404.

(*x*) Ante, pp. 406, 407, 415 ; post, p. 445.

(*y*) L. R. 16 Eq. 340 ; ante, p. 415 ; and see *Heartley* v. *Nicholson*, L. R. 19 Eq. 233.

(*z*) L. R. 18 Eq. 11 ; ante, p. 416.

himself of its *beneficial* ownership; and he must, in some way or other amounting to a valid declaration of trust, declare that he thenceforward holds that property in trust for his donees.

*The declaration itself to be effectual must be definite; it must take effect from the time at which it is made, and it must be final (*a*). [*440]

So a mere promise to give will not be supported as a declaration of trust (*b*); nor will expressions which import nothing more than a determination to divide property among certain persons (*c*); nor will the expression of an intention to do something in the future (*d*). So a gift which is really testamentary—that is to say, where the donor has no intention of parting with the property during his life—cannot be supported on the ground that the donor meant to convert himself into a trustee (*e*).

Acts or words relied on must support *no other* view.

The acts or words which are relied upon to establish the fact that the donor has declared himself a trustee for his donees must admit of no other interpretation. It is not enough that they are consistent with it, or merely equivocal (*f*). So the mere fact that the donor has regularly transmitted to the donee the dividends on the stock as they became due from the time the incomplete gift of that stock was made to the donee is not enough (*g*).

Valid declarations of trust.

The following acts have been held valid declarations of trust:—

(*a*) *Dipple* v. *Corles*, 11 Hare, 183; *Cotteen* v. *Missing*, 1 Mad. 176, 185; *Hughes* v. *Stubbs*, 1 Hare, 476; *Scales* v. *Maude*, 6 De G. M. & G. 51; *Jones* v. *Lock*, L. R. 1 Ch. 25; *Maguire* v. *Dodd*, 9 Ir. Ch. Rep. 452; *Penfold* v. *Mould*, L. R. 4 Eq. 562; *Re Glover*, 2 J. & H. 186; *Forbes* v. *Forbes*, 6 W. R. 92; *In re Mills' Estate*, 7 W. R. 372.

(*b*) *Dipple* v. *Corles*, 11 Hare, 183.

(*c*) *Dipple* v. *Corles*, 11 Hare, 183; *Re Glover*, 2 J. & H. 186; and see *Forbes* v. *Forbes*, 6 W. R. 92; *In re Mills' Estate*, 7 W. R. 372; *Jones* v. *Lock*, L. R. 1 Ch. 25; *Lister* v. *Hodgson*, L. R. 4 Eq. 30.

(*d*) *Bottle* v. *Knocker*, 46 L. J. (N.S.) Ch. 159.

(*e*) *In re Joseph Patterson's Estate*, 4 D. J. & S. 422; *Warriner* v. *Rogers*, L. R. 16 Eq., per Bacon, V.C., 340; and see *In re Shield*, 53 L. T. (N.S.) 5.

(*f*) *Dipple* v. *Corles*, 11 Hare, 185, 187; *Heartley* v. *Nicholson*, L. R. 19 Eq. 242.

(*g*) *Milroy* v. *Lord*, 4 D. F. & J. 264; *Moore* v. *Moore*, L. R. 18 Eq. 474; *Heartley* v. *Nicholson*, L. R. 19 Eq. 233.

The execution of a power of attorney, after treating the property as subject to the trust (*h*), entries in the books of the firm of which the donor was a partner (*i*), a letter written to co-trustees directing payment of fu-
[*441] ture dividends (*k*), the donor *having a sum of money transferred by her bankers to an account in the joint names of the donees and herself as trustee for them (*l*), mixing another fund with one of which trusts had been declared (*m*), and treating the aggregate fund as held on trust (*n*), investing a further sum in the names of the trustees of a settlement without informing them (*o*), letter and memorandum in diary (*p*), memorandum (*q*), letter by a debtor to his creditor (*r*), or promissory note (*s*), with payment to the trustees secured by deposit of title deeds, a receipt in the following form: "Received of D., for the use of A., £100, to be paid to A. at D.'s death, but interest at 4 per cent. to be paid to D." (*t*); a promissory note given by a husband to his wife (*u*); a memorandum indorsed on a lease, "this deed and all thereto belonging I give to E. from this time forth, with all the stock in trade" then given to B.'s mother for him (*v*); an assignment of a debenture which stood in the name of the donor in the company's books till his death (*w*); a debt secured by a promissory note payable on demand (*x*); an assign-

(*h*) *Ex parte Pye*, 18 Ves. 140; 2 Spence, Eq. Jur. 53, n. In *Richardson* v. *Richardson*, L. R. 3 Eq. 686, the mere execution of an assignment with power of attorney was held a declaration of trust; but vide ante, pp. 418, 419.

(*i*) *Stapleton* v. *Stapleton*, 14 Sim. 186; and see *Gray* v. *Gray*, 2 Sim. (N.S.) 273, and *Forbes* v. *Forbes*, 6 W. R. 92.

(*k*) *Bentley* v. *Mackay*, 15 Beav. 12; and see *Evans* v. *Jennings*, 6 W. R. 616.

(*l*) *Wheatley* v. *Purr*, 1 Keen, 551.

(*m*) *Muggeridge* v. *Stanton*, 7 W. R. 638.

(*n*) *Thorpe* v. *Owen*, 5 Beav. 224.

(*o*) *In re Curteis' Trusts*, L. R. 14 Eq. 217.

(*p*) *In re Cane's Trusts*, 36 L. J. (N.S.) Ch. 744; but see *Re Glover*, 2 J. & H. 186.

(*q*) *James* v. *Bydder*, 4 Beav. 600.

(*r*) *Woodroffe* v. *Johnston*, 4 Ir. Ch. Rep. 319.

(*s*) *Arthur* v. *Clarkson*, 35 Beav. 458.

(*t*) *Moore* v. *Darton*, 4 De G. & Sm. 517.

(*u*) *Murray* v. *Glasse*, 23 L. J. (N.S.) Ch. 126. For other instances, see *Woodroffe* v. *Johnston*, 4 Ir. Ch Rep. 319; *Lloyd* v. *Chune*, 2 Giff. 441; *Smith* v. *Warde*, 15 Sim. 56; *Field* v. *Lonsdale*, 13 Beav. 78; *Vandenberg* v. *Palmer*, 4 K. & J. 204; *Mackintosh* v. *Stuart*, 36 Beav. 21; *Kelly* v. *Walsh*, 1 L. R. Ir. 275; *Morgan* v. *Malleson*, L. R. 10 Eq. 475; but see *Warriner* v. *Rogers*, L. R. 16 Eq. 348; ante, p. 415.

(*v*) *Richards* v. *Delbridge*, L. R. 18 Eq. 11; ante, p. 416.

(*w*) *West* v. *West*, 9 L. R. Ir. 121.

(*x*) *Lee* v. *Magrath*, 10 L. R. Ir. 45, 313.

ment of a policy by deed poll by a husband to his wife attested by one witness (*y*); an order by A. to B., his debtor, to hold the amount of the debt secured by B.'s promissory note on certain specified trusts (*z*); a gift of railway stock certificates by a husband to his wife, which remained in his name, but the dividends on which he received and paid to his wife (*a*); a gift, by letters, of furniture in a house occupied by husband and wife up to his death (*b*); a memorandum for payment of £150 in the *bank after the donor's death, [*442] although he always kept the memorandum (*c*); an investment by A. of stock in B.'s name, with a letter from A. informing B. of the gift, afterwards destroyed at A.'s request (*d*); the transfer by deed of a debenture to three persons and a letter by the donor to his solicitor saying it was "for my niece Mrs. M. and her children" (*e*).

Husband and wife.

A husband could before 1883 (*f*) and of course can now constitute himself a trustee of his property for his wife (*g*). Before 1883 he could not in law transfer property to her by way of gift. In every case, however, whether before or after 1883, the same principles, it is conceived, now apply to test whether a husband has made himself a trustee for his wife as apply to test whether he has made himself a trustee for *any* other person (*h*).

The consent of a married women given before commissioners to the transfer and payment to her husband of money standing in court to her separate account, so long as the transfer remains uncompleted, is not an *irrevocable* declaration of trust (*i*).

Invalid declarations of trust.

The following acts have been held insufficient to create a declaration of trust:—

If a testator by will appoints property to trustees upon

(*y*) *Hayes* v. *Alliance Co.*, 8 L. R. Ir. 149.
(*z*) *In re Caplen's Estate*, 45 L. J. (N.S.) Ch. 280.
(*a*) *Moore* v. *Moore*, L. R. 18 Eq. 474.
(*b*) *In re Breton's Estate*, 17 Ch. D. 416.
(*c*) *Armstrong* v. *Tamperon*, 19 W. R. 558.
(*d*) *Beecher* v. *Major*, 12 L. J. (N.S.) 562.
(*e*) *In re Bellasis*, L. R. 12 Eq. 218.
(*f*) *Baddeley* v. *Baddeley*, 9 Ch. D. 113; *Fox* v. *Hawkes*, 13 Ch. D. 822; ante, pp. 421, 422.
(*g*) 45 & 46 Vict. c. 75, ss. 1, 2, 5, 25.
(*h*) *In re Breton's Estate*, 13 Ch. D. 416; *Grant* v. *Grant*, 34 Beav. 623; ante, pp. 421, 423.
(*i*) *Penfold* v. *Mould*, L. R. 4 Eq. 562.

trusts to be *afterwards* declared, and subsequently declares those trusts by letters, such letters cannot operate as a gift or settlement inter vivos ; because they are merely in furtherance of the testamentary dispositions, and if the will had been revoked, the letters must have dropped with it (*k*).

And putting a cheque into a child's hand and saying, "I give this to baby for himself," and then taking back the cheque and expressing an intention of giving the amount of it to the child, has been held no declaration of trust of the money (*l*) ; nor is a document signed by the donor, addressed to his executors, stating a gift of a debenture bond requesting them on his death to [*443] give the *bond to the donee, although he kept the bond and received the interest during his life (*m*) ; and merely giving instructions to a solicitor to carry into effect a contemplated gift will not bind (*n*).

So an ordinary covenant in a deed by a married woman and her husband to surrender copyholds (to which she was then entitled in fee, and had a right to be admitted tenant on the rolls) to trustees upon trust for sale and investment of the proceeds upon trusts for herself and others, was held an incomplete transfer and inconsistent with any intention to declare herself a trustee (*o*).

Notice to cestui que trust not necessary if property *legally* vested in donor.

It has been doubted in some of the older cases whether, if a person voluntarily declares himself a trustee of property *legally* vested in himself, it is necessary that the trust should be disclosed to the cestuis que trust and afterwards acted on (*p*) ; but it is established by the cases cited above that this is not necessary (*q*).

The Statute of Frauds provides (*r*) that all declara-

(*k*) *Johnson* v. *Ball*, 5 De G. & Sm. 85 ; and see *In re Fleetwood*, 15 Ch. D. 604.
(*l*) *Jones* v. *Lock*, L. R. 1 Ch. 25.
(*m*) *In re Shield*, 53 L. T. (N.S.) 5.
(*n*) *In re Mills' Estates*, 7 W. R. 372 ; *Gee* v. *Liddell*, 35 Beav. 621.
(*o*) *Green* v. *Paterson*, 32 Ch. D. 95.
(*p*) *Meek* v. *Kettlewell*, 1 Hare, 471, S. C. 1 Ph. 342.
(*q*) See post, pp. 451 et. seq., as to notice of equitable assignments ; and see *Reed* v. *O'Brien*, 7 Beav. 32 ; *Tate* v. *Leithead*, Kay, 658,
(*r*) 29 Car. 2, c. 3, s. 7. See *Leman* v. *Whitley*, 4 Russ. 423 ; *Smith* v. *Matthews*, 3 D. F. & J. 139 ; and see Agnew, Stat. Fr. p. 420.

tions or creations of trusts or confidences of any *lands, tenements, or hereditaments* shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or be his last will in writing; or else they shall be utterly void and of none effect.

Trusts of *land, tenements*, or *hereditaments* proved by writing.

By section 8, all declarations or creations of *lands, tenements, or hereditaments* which arise or are transferred or extinguished by implication or operation of law are exempted from this statute.

The *beneficial* owner is the only person who is by law enabled to declare the trust (*s*). To comply with this statute, not only must the existence of the trust be manifested or proved by writing signed by the *beneficial* owner, but it must be similarly manifested or proved what the trust is (*t*).

*The declaration itself need not be in writ- [*444] ing; it is enough if it is proved by some subsequent writing (*u*).

A trust of personal property may be validly declared or created by *parol*, whether the donor declares himself or some other person a trustee of the property (*v*). Vague conversations, however, cannot be allowed to have that effect (*w*). In *Paterson* v. *Murphy* (*x*), Lord Hatherley (then Sir W. P. Wood, V.C.) said: "It may be doubtful whether the Court would hold that a voluntary trust could be created by merely oral expression; so much might depend on a correct report of the words. If, as part of a verbal communication by a supposed

Parol declarations of trust of personal property.

(*s*) *Tierney* v. *Wood*, 19 Beav. 330; *Kronheim* v. *Johnson*, 7 Ch. D. 60; post, p. 446.

(*t*) *Smith* v. *Matthews*, 3 D. F. & J. 151, 152.

(*u*) *Foster* v. *Hale*, 3 Ves. 696. As to whether partnership property is within the section, see *Dale* v. *Hamilton*, 5 Hare, 369, S. C. 2 Ph. 266.

(*v*) *Nab* v. *Nab*, 10 Mod. 404; *Fordyce* v. *Willis*, 3 Bro. C. C. 577, and note; *Bayley* v. *Boulcott*, 4 Russ. 345; *Benbow* v. *Townsend*, 1 My. & K. 506; *M'Fadden* v. *Jenkyns*, 1 Hare, 458, 461, S. C. 1 Ph. 153–157; *Hughes* v. *Stubbs*; 1 Hare, 476; *Lucas* v. *Lucas*, 1 Atk, 270, West (t. H.) 456; *Lister* v. *Hodson*, L. R. 4 Eq. 30; *Parker* v. *Stones*, 38 L. J. (N.S) Ch. 46; *Roberts* v. *Roberts*, 15 W. R. 117; *Milroy* v. *Lord*, 4 D. F. & J. 274; *Jones* v. *Lock*, L. R. 1 Ch. 25; *Makeown* v. *Ardagh*, 10 I. R. Eq. 445.

(*w*) *Jones* v. *Lock*, L. R. 1 Ch. 25.

(*x*) 11 Hare, 88, 91–92; and see *Dipple* v. *Corles*, 11 Hare, 184–5.

settlor, he had used words of this sort: 'I propose to do so and so,' or, 'It is my present intention' to do it, the effect might be to shew that he had not at the time absolutely determined to create the trust; and in such a case I can well imagine that the Court would require extremely strong evidence before it would say that an irrevocable trust was created" (*y*). But, on the other hand, if the parol declaration is clearly proved, and there is no doubt about it, "the Court will give effect to the trust as readily as if it were in writing" (*z*).

An ante-nuptial agreement between an intended wife and her husband will operate as a declaration of trust of the fee simple of her real estate for her separate use only if it is in writing and signed by her as well as by her husband (*a*).

Evidence to establish a trust.

To establish a valid declaration of trust by the donor, so as to rebut the presumption of a resulting trust, the evidence in favour of that declaration of trust must be [*445] clear and distinct. It is not *enough that the evidence should merely support the trust; it must be capable of no other interpretation. The question depends on all the circumstances of each particular case. The burden of proof, of course, lies on those who seek to establish the trust; and although their evidence is that of interested parties, yet it is not inadmissible, but must be weighed, having regard to that fact, like all other evidence in the case (*b*).

Donor merely *equitable* owner.

II. Cases in which the donor is merely the *equitable* owner of the property, and intends to make the gift without affecting the *legal* interest.

There are two ways in which a donor may carry out his purpose:

1. He may assign his equitable interest direct to his donees.

2. He may execute a declaration of trust of his equi-

(*y*) See *Hughes* v. *Stubbs*, 1 Hare, 476; *Scales* v. *Maude*, 6 De G. M. & G. 51 and *Maguire* v. *Dodd*, 9 Ir. Ch. Rep. 452, 455–6.

(*z*) Per Lord Romilly in *Peckham* v. *Taylor*, 31 Beav. 254; *Jones* v. *Lock*, L. R. 1 Ch. 28.

(*a*) *Dye* v. *Dye*, 13 Q. B. D. 147.

(*b*) *Roberts* v. *Roberts*, 15 W. R. 117; *In re Curteis' Trust*, L. R. 14 Eq. 217; *Heartley* v. *Nicholson*, L. R. 19 Eq. 242, 243 ante, p. 440.

table interest in favour of his donees. The trustees for his donees may be, either the existing trustees for the donor, or *new* trustees selected by him (*c*).

Of course, when once the property has been assigned, or a trust has been actually executed, the assignment cannot be defeated nor the trust revoked by any accident which subsequently occurs—by, for instance, a transfer of the fund into court. The duty which is once fixed is not to be changed by any circumstance which afterwards occurs (*d*).

Whichever mode the donor intends to use, he must by that mode fully complete his gift (*e*); for the Court will not make his gift effectual by a way he did not intend (*f*).

Donor's trustee a trustee for donee.

It is clear that where the owner of a vested equitable estate has voluntarily directed his trustee to pay over the dividends or the property to his nominee, and this direction has been accepted * and acted on [* 446] by the trustee, there is a valid executed trust created which he cannot revoke (*g*).

Declaration of trust.

In *Ellison* v. *Ellison* (*h*), Wren and Ellison, partners in a colliery, took a conveyance of the property, in the name of Wren. Wren executed a deed declaring that he held Ellison's portion in trust for Ellison. Ellison then executed a deed assigning his interest in a portion of his share to Wren, on certain trusts for himself for life and for other persons after his decease. Lord Eldon held this a valid declaration of trust, saying (*i*):

(*c*) *Fowkes* v. *Pascoe*, L. R. 10 Ch. 343; *Marshal* v. *Crutwell*, L. R. 20 Eq. 328; post, pp. 446 et seq.

(*d*) *Rycroft* v. *Christy*, 3 Beav. 238, 242; and see *Ellison* v. *Ellison*, 6 Ves. 656, 662; *Smith* v. *Lyne*, 2 Y. & C. Ch. 345; *Wheatley* v. *Purr*, 1 Keen, 551; *Browne* v. *Cavendish*, 1 J. & Lat. 637; ante. p. 425.

(*e*) *Kekewich* v. *Manning*, 1 De G. M. & G. 176; *Donaldson* v. *Donaldson*, Kay, 711; *In re Walhampton Estate*, 26 Ch. D. 391; post, p. 451.

(*f*) Ante, pp. 406, 430.

(*g*) *Villers* v. *Beaumont*, 1 Vern. 100; *Ellison* v. *Ellison*, 6 Ves. 656; *Rycroft* v. *Christy*, 3 Beav. 238; *Frampton* v. *Frampton*, 4 Beav. 287; *Bentley* v. *Mackay*, 15 Beav. 12; *M'Fadden* v. *Jenkyns*, 1 Hare, 458, S. C. 1 Ph. 153; *Lambe* v. *Orton*, 1 Dr. & Sm. 125; *Parker* v. *Stones*, 38 L. J. (N.S.) Ch. 46; *Dilrow* v. *Bone*, 3 Giff. 538; *Harding* v. *Harding*, 17 Q. B. D. 442; see post, pp. 451 et seq.

(*h*) 6 Ves. 656,

(*i*) 6 Ves. 663.

"Ellison clothes the legal estate remaining in Wren with the equitable interests declared by the first deed, making him, therefore, a trustee, for Ellison himself first, and after his death for several other persons." And it has been held (*k*) that a document containing such direction is valid as a declaration of trust of realty, though signed only by the cestui que trust, and not by the *legal* owner, and not attested, and notwithstanding the 7th section of the Statute of Frauds (*l*).

Assignment to volunteers direct.

And it is evident that there is only a difference of form between such cases and those in which the owner of an equitable interest has simply assigned it to his donee for the donee's own benefit (*m*).

Assignment to *new* trustees.

But where the owner of an equitable interest assigns it to *new* trustees for the benefit of third persons a different question is brought forward, and one on which the cases are full of difficulty.

Legal estate assigned also.

If, having the control of the legal estate also, the owner attempts or intends to convey that to the new trustees, and does not effectually do so, then the gift is ineffectual (*n*); and it is, indeed, difficult to distinguish on principle a case of this nature from those in [* 447] * which the donor had the legal estate actually in him and attempted to, but did not effectually, convey it (*o*). The gift is not complete according to the way in which the donor intended it to operate.

Equitable interest assigned to *new* trustee.

But if the donor simply intends to assign the equitable interest to the *new* trustee, leaving the legal title untouched, and does so effectually, a valid trust is created (*p*).

Two different views have been taken by the Court as

(*k*) *Tierney* v. *Wood*, 19 Beav. 330; *Kronheim* v. *Johnson*, 7 Ch. D. 60.

(*l*) Vide ante, p. 443.

(*m*) *Cotteen* v. *Missing*, 1 Mad. 176; where, however, the assignment was held incomplete. *Godsal* v. *Webb*, 2 Keen, 99; *Collinson* v. *Pattrick*, 2 Keen, 123; *Wilcocks* v. *Hannyngton*, 5 Ir. Ch. Rep. 38.

(*n*) *Bridge* v. *Bridge*, 16 Beav. 315; *Beech* v. *Keep*, 18 Beav. 285; ante, pp. 425 et seq.

(*o*) Ante, pp. 415 et seq.

(*p*) See cases infra, and *Gilbert* v. *Overton*, 2 H. & M. 110, ante, p. 428; *Gannon* v. *White*, 2 Ir. Eq. Rep. 207; contrà, *Beatson* v. *Beatson*, 12 Sim. 281, in which, however, the circumstances were peculiar.

to the efficacy of an assignment to *new* trustees of an equitable interest, or equitable chose in action, or a possibility, or of a legal chose in action formerly not legally assignable (*q*).

Assignment formerly void at law, a *mere* contract in equity.

On the one hand, it has been held that, inasmuch as such an assignment has no operation at law, it must be regarded as a mere *contract* or agreement to assign.

Such a contract or agreement will be enforced under and subject to the same conditions as any other contract or agreement. That is to say, the Court will enforce it *only* when the contract or agreement is supported by a valuable consideration (*r*). A mere voluntary assignment of such an interest is therefore, on this view, altogether inoperative.

The leading case which was decided on this principle is that of *Meek* v. *Kettlewell* (*s*).

Meek v. *Kettlewell.*

There Mrs. K. had an *expectant* interest as next of kin in a sum of money vested in the trustees of her husband's will, to which she would, as next of kin, become entitled if her daughter should die in her lifetime without issue. During her daughter's * life [* 448] Mrs. K. by a voluntary deed assigned this expectant interest to M., in trust, as to part of it for herself, and as to the residue for M. absolutely. The deed contained the usual power to M., upon the death of the daughter without issue, to demand the money from the trustees, and to give an effectual receipt for it. Notice of the assigment was not given to the trustees.

Sir J. Wigram, V.C., and Lord Lyndhurst on appeal, held the assignment in legal form of an equitable interest invalid.

But the Vice-Chancellor expressly limited the scope

(*q*) *Grey* v. *Kentish*, 1 Atk. 280; *Bates* v. *Dandy*, 2 Atk. 207–8; *Theobald* v. *Duffey*, 9 Mod. 102; *Chandos* v. *Talbot*, 2 P. Wms. 608; *Meek* v. *Kettlewell*, 1 Hare, 464, S. C. 1 Ph. 342; *Richardson* v. *Richardson*, L. R. 3 Eq. 693; ante, pp. 411, 412; post, pp. 453, 457.

(*r*) *Wright* v. *Wright*, 1 Ves. 409; *Meek* v. *Kettlewell*, 1 Hare, 464, S. C. 1 Ph. 342, 345–7; *Colman* v. *Sarrel*, 3 Bro. C. C. 12, 1 Ves. Jun. 50; *Ward* v. *Audland*, 8 Sim. 571, 8 Beav. 201; *Beatson* v. *Beatson*, 12 Sim. 281; *Sewell* v. *Moxay*, 2 Sim. (N.S.) 189; *Scales* v. *Maude*, 6 De G. M. & G. 43; *Richards* v. *Delbridge*, L. R. 18 Eq. 15. And see *Holloway* v. *Headington*, 8 Sim. 324; *Edwards* v. *Jones*, 7 Sim. 325, S. C. 1 My. & Cr. 226.

(*s*) 1 Hare, 464, S. C. 1 Ph. 342.

of his judgment. He said: "I decide only that a voluntary assignment of a mere expectancy, not communicated to those in whom the legal interest is, does not create a trust in equity within the principle of the cases relied upon by the plaintiff" (*t*). And Lord Lyndhurst in his judgment distinguished this case from that of *Sloane* v. *Cadogan* (*u*), upon the ground that this was the assignment of a mere expectancy that conveyed no estate or interest to the assignee, while in *Sloane* v. *Cadogan* (*u*) the assignment was of a *vested* interest (*v*).

Sloane v. *Cadogan.*

On the other hand, in the case of *Sloane* v. *Cadogan* (*u*) it has been held that an equitable interest in a reversionary sum of stock may be assigned in equity.

In that case Mr. W. Cadogan had an equitable reversionary interest in a fund vested in trustees. He assigned this by deed to other trustees upon trusts for volunteers.

Sir W. Grant, M.R., held that the assignment created a valid trust. He said: "As against the party himself and his representatives, a voluntary settlement is binding. The Court will not interfere to give perfection to the instrument, but you may constitute one a trustee for a volunteer. Here the fund was vested in trustees; Mr. W. Cadogan had an equitable reversionary interest in that fund, and he has assigned it to certain trustees; and then the first trustees are trustees for his assigns, and they may come here; for when the trust is created [* 449] *no consideration is essential, and the Court will execute it, though voluntary."

Kekewich v. *Manning.*

In the leading case of *Kekewich* v. *Manning* (*w*) the earlier authorities were all carefully reviewed, and *Sloane* v. *Cadogan* (*x*) followed.

In that case a lady was absolutely entitled in remainder, subject to her mother's life interest, to a sum of stock standing in the joint names of herself and her mother. On her marriage she assigned her interest in this stock to other trustees, upon certain trusts, and in

(*t*) *Meek* v. *Kettlewell*, 1 Hare, 476, S. C. 1 Ph. 342, commented on in *Penfold* v. *Mould*, L. R. 4 Eq. 564, 565.
(*u*) Sug. V. & P. 11th ed. app. 24, stated 2 Sim. 291.
(*v*) *Meek* v. *Kettlewell*, 1 Ph. at p. 348.
(*w*) 1 De G. M. & G. 176.
(*x*) Sug. V. & P. 11th and previous eds. app. No. 24.

default of issue of the marriage, upon trust for her niece. There was no issue of the marriage. The stock was not transferred to the new trustees. The mother had notice of this settlement.

Lord Justice Knight Bruce upheld the voluntary trust in favour of the neice (treating the question as if she were not within the consideration of the marriage), following the principles established in *Ellison* v. *Ellison* (*y*), *Sloane* v. *Cadogan* (*x*), *Fortescue* v. *Barnett* (*z*), *Wheatley* v. *Purr* (*a*), and *Blakely* v. *Brady* (*b*).

His lordship laid down the law as follows: "It is, on legal and equitable principles, we apprehend clear that a person sui juris, acting freely, fairly, and with sufficient knowledge, ought to have and has it in his power to make, in a binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or reversionary, and howsoever circumstanced." And he illustrated this in the following way:—"Suppose stock or money to be legally vested in A., as a trustee for B., for life, and subject to B.'s life interest for C. absolutely; surely it must be competent to C., in B's lifetime, with or without the consent of A., to make an effectual gift of C.'s interest to D., by way of mere bounty, leaving the legal interest and legal title unchanged and untouched. Surely it would not be consistent with *natural equity, or with [* 450] reason or expediency, to hold the contrary, C. being sui juris, and acting freely, fairly, and with sufficient advice and knowledge. If so, can C. do this better or more effectually than by executing an assignment to D. ?"

This case was followed in *Voyle* v. *Hughes* (*c*) by Sir J. Stuart, V.C, who, in an elaborate judgment, shewed the older cases (*d*) not to be opposed to the doctrine *Voyle* v. *Hughes.*

(*y*) 6 Ves. 656, 1 Wh. & Tu. L. C. 6th ed. 291.
(*x*) Sug. V. & P. 11th and previous eds. No. 24.
(*z*) 3 My. & K. 36; post, p. 454.
(*a*) 1 Keen. 551.
(*b*) 2 Dr. & Wal. 311; post, p. 454.
(*c*) 2 Sm. & Giff. 18.
(*d*) See *Carteret* v. *Paschal*, 3 P. Wms. 197, 208; *Thomas* v. *Freeman*, 2 Vern. 563; *Crouch* v. *Martin*, 2 Vern. 595; *Sloane* v. *Cadogan*, Sug. V. & P. 11th and previous eds. app. No. 24; *Fortescue* v. *Barnett*, 3 My. & K. 36; and see *Hawkyns* v. *Obyn*, 2 Atk. 549; *Wind* v. *Jekyl*, 1 P. Wms. 574, and note; *Jewson* v. *Moulson*, 2 Atk. 421; *Theobalds* v. *Duffoy*, 9 Mod. 102; *Higden* v. *Watkinson*, post, Appendix No. X.

that equitable reversionary interests in personalty are assignable in equity.

In that case A. B., who had a vested interest in certain stock standing in the names of the trustees of a settlement, subject to a life estate, by a voluntary deed assigned that interest to C. D. absolutely, and gave C. D. a power of attorney to receive the stock from the trustees. Notice was given to the trustees. Sir J. Stuart, V.C., upheld the equitable assignment as a perfect instrument, and, as such, valid in equity.

Lambe v. *Orton.*

So in *Lambe* v. *Orton* (*e*) a letter was written by a cestui que trust to his trustee, directing him to pay the share of residuary personality to which he was beneficially entitled to three specified persons. The trustee acted on the letter, and paid part of the money to one of the persons named in the letter; on the writer's death it was held that the letter operated as an assignment of his whole share, whether immediately payable or in reversion.

So in *Penfold* v. *Mould* (*f*), Lord Hatherley (then Sir W. P. Wood, V.C), commenting on *Meek* v. *Kettlewell* (*g*), said that "that decision has been, in effect, overruled, and it is now held that any instrument may be a sufficient declaration of trust; no form being necessary, the only material question being, 'Did the grantor, or did he not, mean at once to pass the property?'"

Nature of the interest or of the property immaterial.

These decisions, it is conceived, establish that the *nature* of the interest in the property the subject of the [* 451] assignment is * immaterial. That is to say, the subject-matter of the assignment may be a vested or a contingent interest (*h*). It may also be a *mere expectancy*, unless *Meek* v. *Kettlewell* (*g*), which has never been expressly overruled, should be held still to apply, upon the ground that an assignment by a person who has no *actual* interest ought to be regarded rather as an agreement to assign than as an actual assignment. The interest itself, whatever may be its nature, may be an interest in *either* real or personal property (*k*).

(*e*) 1 Dr. & Sm. 125; and see *In re King*, 14 Ch. D. 179; post, p. 455.
(*f*) L. R. 4 Eq. 565. (*g*) 1 Hare, 464, S. C. 1 Ph, 342.
(*h*) Ante, pp. 447 et seq.
(*k*) Ante, pp. 407 et seq.

Test of valid assignment.

The test which will now be applied in every case is, whether or not the assignor has *at the time* of the assignment made as complete a transfer of his interest as he was capable of effecting; and if he has, such an assignment is perfectly good and valid as between him and his assignee (*l*).

Whether notice to trustees and acceptance by them necessary in *equitable* assignments.

It has been decided whether, in cases of voluntary *equitable* assignments or declarations of trust, the gift is complete until notice of it has been given to the trustees, and the new trust accepted and acted upon by them; and also to the assignees or cestuis que trust (*m*).

As between the donor and the donee, all that is now essential to make the transaction perfectly valid appears to be for the donor to have done all that is necessary to complete the transfer he has made or the trust he has created. At the time the transfer is made, or the trust created, it is enough if the transaction is as complete as it was *then* in the donor's power to make it (*n*).

That is to say, if the title of the *donee* is so far complete that the Court is not called upon to act against the donor, it will assist the *donee* in obtaining the property from any person who would be treated as a trustee for him (*o*).

So as between the assignor and assignee, or as against a subsequent voluntary assignee, who stands in the same position as *the assignor, giving notice [* 452] of the assignment to the trustee or company or debtor is wholly immaterial (*p*).

Notice to trustee only necessary as against *third* party.

It is only to perfect the title of the donee as against *third* parties that the question of notice to the trustees in whose hands the property is becomes material. It is therefore the duty of the *donee* or of his trustees, and not of the donor, to give such notice.

(*l*) *In re Walhampton Estate*, 26 Ch. D. 395; *Harding* v. *Harding*, 17 Q. B. D. 442.

(*m*) *Meek* v. *Kettlewell*, 1 Hare, 471, S. C. 1 Ph. 342; *Rycroft* v. *Christy*, 3 Beav. 238–241; *Bridge* v. *Bridge*, 16 Beav. 322.

(*n*) *Donaldson* v. *Donaldson*, Kay, 711, 719; *In re Walhampton Estate*, 26 Ch. D. 391; ante, p. 445.

(*o*) *Donaldson* v. *Donaldson*, Kay, 718; *Reed* v. *Reed*, 7 Beav. 32.

(*p*) *Justice* v. *Wynne*, 12 Ir. Ch. Rep. 289; and see *Ryall* v. *Rowles*, 2 Wh. & Tu. L. C. 6th ed. 848.

So in *Fortescue* v. *Barnett* (*q*), where a donor assigned by deed a policy of assurance on his life to trustees upon certain trusts, and gave no notice to the assurance office, it was held that the donor had completed the title of the trustees, and that it was their duty to have given notice to the office.

So in *In re King* (*r*) it was held by Hall, V.C., following *Fortescue* v. *Barnett* (*q*) and *Pearson* v. *Amicable Assurance Office* (*s*), that an assignment by letter of policies of assurance to trustees on certain trusts of which no notice was given to the assurance offices was valid; and that it was the business of the trustees to give the notice.

Of course, until the trustees in whose hands the property is have received notice, whether from the donee or from his trustees, they may safely transfer the property to the original cestui que trust without incurring any liability for so doing either to the donee or to his trustees. The donee and his trustees omit to give such notice at their peril (*t*). But such notice will not affect the rights of volunteers inter se (*u*).

Notice to, and acceptance of trust by, trustee not necessary to its validity.

It is immaterial to the validity of the trust whether it has been communicated to, and accepted by, the trustee or not; for the trustee cannot, by refusing to accept the trusts, defeat the assignment.

So in *In re Curteis' Trusts* (*v*), where the settlor directed a sum of £2000 to be invested in consols in the [* 453] names of the * trustees of his marriage settlement, to whom he never communicated what he had done, and received through his bank the dividends on the whole, it was held that this *additional* sum was thereby made subject to the trusts of the settlement.

So in *Jones* v. *Jones* (*w*), where the trustee first

(*q*) 3 My. & K. 36.

(*r*) 14 Ch. D. 179; and see *Pearson* v. *Amicable Assurance Office*, 27 Beav. 227; *In re Way's Trusts*, 2 D. J. & S. 365.

(*s*) 27 Beav. 227.

(*t*) *Donaldson* v. *Donaldson*, Kay, 711; ante, p. 451.

(*u*) *Justice* v. *Wynne*, 12 Ir. Ch. R. 289.

(*v*) L. R. 14 Eq. 217; and see *Kekewich* v. *Manning*, 1 De G. M. & G. 198.

(*w*) 31 L. J. (N.S.) Ch. 535; and see *In re Way's Trusts*, 2 D. J. & S. 365; *Sloper* v. *Cottrell*, 2 D. J. & S. 365; *Penfold* v. *Mould*, L. R. 4 Eq. 562; *Gilbert* v. *Overton*, 2 H. & M. 110; but see *Loveridge* v. *Cooper*, 3 Russ. 30.

heard of the trusts after the death of the settlor and then refused to accept them, the settlement was held to be valid.

The question, therefore, whether notice has been given to the trustee in whom the property is vested, or whether the trust has been accepted by the trustee of the voluntary deed, is, so far as relates to its validity as between donor and donee, quite immaterial.

Notice to cestuis que trust not necessary.

And on the same ground it has been decided that the trust need not be communicated to the cestuis que trust (*x*).

So a voluntary settlement never communicated to the beneficiaries, and kept by the settlor and found after his death among his waste papers, was upheld against a subsequent voluntary settlement (*y*).

Transfer of *legal* interests not *legally* assignable.

III. With regard to the transfer or assignment of *legal* interests, all of which formerly were not transferable or assignable at *law* (*z*), the following principle seems to have been established:—

The settlor could *not* divest himself of his legal estate, and consequently could not make a perfect and complete *gift* of the property direct to his donees.

Settlor could only declare a trust.

But he could declare a trust of it, either by making himself or some other person a trustee for his donees.

The question in each case seems to have been this: had the *donor done all that he could to make [* 454] his gift complete as between himself and his donee? If so, the Court would support the transfer or assignment as a declaration of trust, just as if it had been a transfer or assignment of an equitable interest (*a*).

(*x*) *Hope* v. *Harman*, 11 Jur. 1097; *In re Way's Trusts*, 2 D. J. & S. 365; *Dillon* v. *Coppin*, 4 My. & Cr. 660; *Lambe* v. *Orton*, 1 Dr. & Sm. 125; *Tate* v. *Leithead*, Kay, 658; and see *In re Curteis' Trusts*, L. R. 14 Eq. 217.

(*y*) *Clavering* v. *Clavering*, 2 Ver. 473; and see *Barlow* v. *Heneage*, Finch, Prec. Ch. 211.

(*z*) Policies of life assurance have been made legally assignable by 30 & 31 Vict. c. 144; policies of marine assurance by 31 & 32 Vict. c. 86; and debts and other *legal* choses in action by the Judicature Act, 1873, s. 25 (6); see ante, pp. 411 et seq.

(*a*) *Fortescue* v. *Barnett*, 3 My. & K. 36, approved in *Kekewich* v. *Manning*, 1 De G. M. & G. 176, 194; *Blakely* v. *Brady*, 2 D. & Wal. 311; *Pearson* v. *Amicable Assurance Office*, 27 Beav. 229;

Gift of bond.

In *Edwards* v. *Jones* (*b*) the obligee of two bonds signed a memorandum indorsed on one of the bonds, but not under seal, purporting to *assign* the bond without consideration to a person to whom the bond was at the same time delivered.

Lord Cottenham, L.C., held that, the transaction being inoperative for the purpose of transferring the bond, which was a mere chose in action, the question was whether the mere handing over of the bond could constitute a good gift inter vivos; and decided that such gift was imperfect.

It must be observed that this case, following *Antrobus* v. *Smith* (*c*), was treated by Lord Cottenham, L.C., as simply involving the question of gift, or no gift—and was not a question of whether or not a trust had been declared.

Assignment of policy.

In *Fortescue* v. *Barnett* (*d*) T. B. by a voluntary deed assigned a policy on his own life to trustees upon certain trusts. The deed was delivered to one of the trustees therein named. T. B. kept the policy till his death, and notice was not given to the insurance company. It was the practice of the insurance company to recognize the assignee. Sir J. Leach held that the gift of the policy was perfectly complete without delivery. Nothing remained to be done by the grantor, nor could he have done what he afterwards did to defeat his own grant if the trustees had given notice to the insurance office. No act remained to be done to complete the title of the trustees.

Assignment of debt *with* power of attorney.

In *Blakely* v. *Brady* (*e*) A. assigned to B. by deed a memorandum of a sum due to him from C. upon cer- [* 455] tain trusts. The *deed contained a provision irrevocably appointing B. his attorney to sue for and recover the debt. The memorandum was delivered to B. in A.'s life. Lord Plunkett held that the assign-

Parnell v. *Hingston*, 3 Sm. & Giff. 337; *Richardson* v. *Richardson*, L. R. 3 Eq. 686; *Parker* v. *Stones*, 38 L. J. (N.S.) Ch. 461; *Moore* v. *Ulster Banking Co.*, I. R. 11 C. L. 512; and see *Roberts* v. *Lloyd*, 2 Beav. 376.

(*b*) 1 My. & Cr. 226; *Moore* v. *Ulster Banking Co.*, I. R. 11 C. L. 512; and see *Lee* v. *Magrath*, 10 L. R. Ir. 43, 315; *In re Richardson*, 30 Ch. D. 396.

(*c*) 12 Ves. 39.

(*d*) 3 My. & K. 36.

(*e*) 2 D. & Wal. 311.

ment as between donor and donee was complete; and that the power of attorney alone in the assignment would govern the case, and that the relation of trustee and cestui que trust was created (*f*).

The rule seems to have been that with respect to this kind of property what was required was, that the assignor should have done all that he could have been required to do if the assignment had been for value.

So the assignment of a bond or debt or a promissory note or other chose in action, not formerly assignable at law, would be supported if the assignor had given the assignee a *power of attorney* enabling him to sue for and recover the debt without further assistance from the assignor (*g*).

In the recent case of *In re King* (*h*) this principle was followed by Hall, V. C. In that case the facts were as follows:— *In re King.*

K. before his second marriage wrote to one of the trustees of his former settlement stating his desire to make a settlement upon his four children of six policies of assurance on his life, the particulars and the nature of the intended settlement of which he then gave, and which was to contain covenants to keep up the policies and pay the mortgage debt. And he added, "Until the settlement is executed I am to be bound by this agreement in the same manner as if the settlement were actually executed." The letter stated he intended to have a second trustee, but had not yet decided whom to select.

K. two days afterwards sent to the intended trustee three of * the policies, with a letter enclosing [* 456]

(*f*) See *Pearson* v. *Amicable Assurance Office*, 27 Beav. 229; *Parnell* v. *Hingston*, 3 Sm. & Giff. 337; but see *Ward* v. *Audland*, 8 Beav. 201; *Beatson* v. *Beatson*, 12 Sim. 291.

(*g*) Cases supra, and *Tuffnell* v. *Constable*, 8 Sim. 69; *Roberts* v. *Lloyd*, 2 Beav. 376; *Hewitt* v. *Robinson*, 15 W. R. 77; *Pearson* v. *The Amicable Assurance Office*, 27 Beav. 229, 232; *Pedder* v. *Mosely*, 31 Beav. 159; *Norcutt* v. *Dodd*, Cr. & Ph. 100; *Blakely* v. *Brady*, 2 D. & Wal. 311; *Parnell* v. *Hingston*, 3 Sm. & Giff. 337; and see *Richardson* v. *Richardson*, L. R. 3 Eq. 686; *Lee* v. *Magrath*, 10 L. R. Ir. 43, 315; and the creditor may make his debtor a trustee of the debt for a third person: *M'Fadden* v. *Jenkyns*, 1 Hare 458, S. C. 1 Ph. 153, *Parker* v. *Stones*, 38 L. J. (N.S.) Ch. 46; *In re Chaplen's Estate*, 45 L. J. (N.S.) Ch. 280; ante pp. 411, 412.

(*h*) 14 Ch. D. 179.

the former letter, and saying, "The enclosed is the formal letter of assignment previous to a deed, and as binding." The other three policies were mortgaged. No formal settlement of the policies was ever executed, and notice was never given to the offices during the life of K. On the death of the intended trustee the two letters and the three policies were given up to K., who retained them till his death, and by his will bequeathed his residuary estate to trustees on certain trusts.

Hall, V. C., held that, construing the two letters together, there was a clear intention to assign and settle the six policies. There was no intention of the settlor reserving to himself the power of retiring from that which was complete, so far as it could under the circumstances be completed, by handing over the three policies, and he could not hand over the other three policies, because they were in the hands of the mortgagee. But he bound himself to pay off the mortgage debt. In his opinion, it would be absurd to say that, when a person had intended and desired and striven to do everything necessary to make a settlement, the Court would not hold it to be a sufficient settlement; and he therefore declared that the two letters were a complete settlement of the six policies.

It is submitted, however, that this decision is inconsistent with the well-established principle that the Court will not give effect to a mere voluntary agreement to make a settlement which contemplates the taking of a further step in order to perfect the transaction (*i*); and that it is plain from the two letters that K. intended to execute a formal deed to which the two letters were only a step.

Judicature Act, 1873.

By the Judicature Act, 1873 (*k*), an absolute assignment of "*any debt or other legal chose in action*" is now effectual in law (subject to a condition as to giving notice) to pass and transfer the legal right to it *from the date of such notice*, and all legal and other remedies for the same, and the power to give a good discharge without the concurrence of the assignor.

This section does away with the need for a *power of* [* 457] *attorney* in * the assignment of a bond or

(*i*) Ante, pp. 389 et seq.
(*k*) 36 & 37 Vict. c. 66, s. 25 (6); ante, pp. 410 et seq.

mortgage debt or policy of assurance, and makes these legal interests now capable of a legal transfer (*l*)

The Irish Judicature Act, 1877 (*m*), contains the same provision. Irish Judicature Act 1877.

This change in the law, both in England and Ireland, whereby all debts and other legal choses in action are now made capable of being effectually assigned at law, will, in regard to cases within their operation, reduce the question to the principles of *Milroy* v. *Lord* (*n*) and *Richards* v. *Delbridge* (*o*).

The sole question now will be, did the donor *intend* a gift or a trust? And whichever he did intend to effect, has he effectually carried it out? Sole question now is, Has donor effectually carried out his intention?

The recent case in Ireland of *Lee* v. *Magrath* (*p*) illustrates this. In that case the payee of a promissory note not payable to the order of the payee, not negotiable, and not then payable, indorsed and delivered it to L. There was no consideration for the note, but it was found to have been indorsed and delivered with intent to vest the beneficial interest in the money in L. The payee died before the note fell due, having bequeathed his residuary personal estate to B., one of the makers of the note, and his executor. Notice in writing was given to the makers of the indorsement after the death of the payee. *Lee* v. *Magrath*.

It was held that although before the Irish Judicature Act the note was not capable of transfer by indorsement and delivery at law, yet under that Act the debt thereby secured was capable of being legally assigned; and that, as the gift was ineffectual to transfer the legal title, it could not be supported.

It is well established that a gift may be complete as to part of the property comprised in it, and incomplete and invalid as to other parts (*q*). Gifts perfect in part, either as to the property comprised;

(*l*) Dav. Prec. Conv. 4th ed. vol. 2, pp. 133, 137; 30 & 31 Vict. c. 144; 31 & 32 Vict. c. 86; but see *Lee* v. *Magrath*, 10 L. R. Ir. 49.
(*m*) 40 & 41 Vict. c. 57, s. 28 (6).
(*n*) 4 D. F. & J. 264; ante, p. 414.
(*o*) L. R. 18 Eq. 11; ante, p. 416.
(*p*) 10 L. R. Ir. 45, 313.
(*q*) *Dillon* v. *Coppin*, 4 My. & Cr. 647; *Jefferys* v. *Jefferys*, Cr. & P. 138; *Bridge* v. *Bridge*, 16 Beav. 315; *Woodford* v. *Charnley*, 28 Beav. 96.

Bizzey v. *Flight.*

In *Bizzey* v. *Flight* (*r*) a voluntary settlement was [* 458] made of *consols, mortgage debts, bank shares, and certain furniture and effects. The consols were transferred into the names of the trustees, but the bank shares remained at the settlor's death in her name, and the mortgages were not transferred to the trustees, and the deeds were retained by the settlor. Part of the mortgage debts were received by the settlor; part, after her death, by the trustees. The settlement was held valid and complete as to the consols, the mortgage debts received by the trustees, and as to the furniture and effects, but incomplete as to the mortgage debts received by the settlor and as to the bank shares.

or as to the limitations.

The question which limitations, if any, in a voluntary deed, otherwise complete, will not be enforced is dealt with in the same way as if the deed had been for value (*s*).

So a valid perfect gift may be made to one person by an instrument which also contains an incomplete gift to other persons by limitations which will not be enforced (*t*).

Voluntary deed operates from date of its delivery.

The efficacy of a deed depends upon its being sealed and delivered by the maker of it; not on his ceasing to retain possession of it (*u*).

It operates from the time at which it is delivered (*v*). From that moment it is immaterial in whose possession the deed remains, provided that it is a complete instrument which effectually transfers the property comprised in it.

It therefore need not be delivered up by the person who executes it to the person for whose benefit it is intended, or to any person on his behalf.

No subsequent act of settlor can affect complete voluntary deed.

Consequently, a settlor of a complete voluntary deed cannot, by retaining possession of it, suspend its operation, or thereby render it inoperative (*w*).

(*r*) 3 Ch. D. 269; and see *In re King* 14 Ch. D. 186.

(*s*) *Dickinson* v. *Burrell*, L. R. 1 Eq. 343; post, p. 461.

(*t*) *Kekewich* v. *Manning*, 1 De G. M. & G. 176; *Pedder* v. *Moseley*, 31 Beav. 159.

(*u*) *Xenos* v. *Wickham*, L. R. 2 H. L. 323, per Lord Cranworth; and see *Doe d. Garnons* v. *Knight*, 5 B. & C. 671.

(*v*) Shep. Touch. 72; *Browne* v. *Burton*, 5 Dow. & Lowndes, 292; and see *Keith* v. *Pratt*, 10 W. R. 296; Elph. Deeds, 119, 120.

(*w*) *Sloane* v. *Cadogan*, Sug. V. & P. 11th ed. app. No. 24; *Hall* v. *Palmer*, 3 Hare, 537; *Fletcher* v. *Fletcher*, 4 Hare, 67; *Dillon* v. *Coppin*, 4 Myl. & Cr. 660, and cases there cited; *Donald-*

*Neither can the settlor prevent its operation [*459] either by mutilating the deed, as by destroying the seals (*x*), or altering the limitations after its execution (*y*), or by burning (*z*) or destroying it (*a*), or by throwing it away with waste paper (*b*), or by cancelling it (*c*).

So the executors of the settlor can be compelled to produce any voluntary deed of his which comes into their possession (*d*).

Nor will the Court presume that a voluntary declaration of trust, executed by the settlor and retained by him, which at his death could not be found, had been destroyed by the settlor, since it was his duty, as trustee and lawful custodian of the deed, to keep it (*e*).

Probate duty payable on voluntary deeds and donations mortis causâ and debts.

It may be here mentioned that probate duty is, under the Customs and Inland Revenue Act, 1881 (*f*), payable on any property taken as a donatio mortis causâ, or under a voluntary settlement purporting to operate as an immediate gift inter vivos, whether by way of transfer, delivery, declaration of trust, or otherwise, made by a donor who has died on or after June 1, 1881, unless it has been bonâ fide made three months before the death of the donor.

Probate duty is similarly payable upon any property which such donor has voluntarily transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, so that the beneficial interest therein, or in some part thereof, passes or accrues by survivorship on his death to such other person.

Probate duty is also payable on voluntary debts (*g*).

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son v. *Donaldson*, Kay, 711; *Way's Trusts*, 2 D. J. & S. 365; *Bonfield* v. *Hassell*, 32 Beav. 217; *Armstrong* v. *Tamperon*, 19 W. R. 550; *Jones* v. *Jones*, 23 W. R. 1; *Evans* v. *Grey*, 9 L. R. Ir. 539; and see Bythewood & Jarman, 4th ed. vol. 2, pp. 264–6.

(*x*) *Smith* v. *Lyne*, 2 Y. & C. C. C. 345.

(*y*) *Worrall* v. *Jacob*, 3 Mer. 256.

(*z*) *Dalison* v. *Coatsworth*, 1 P. Wms. 731; *Beecher* v. *Major*, 12 L. T. (N.S.) 563.

(*a*) *Naldred* v. *Gilham*, 1 P. Wms. 577; *Re Way's Trusts*, 2 D. J. & S. 365; *Donaldson* v. *Gillott*, L. R. 3 Eq. 278.

(*b*) *Clavering* v. *Clavering*, 2 Ver. 473.

(*c*) *Sepalino* v. *Twilty*, 2 Eq. Ca. Ab. 287; *Lady Hudson's Case*, Prec. Ch. 235; *Donaldson* v. *Gillott*, L. R. 3 Eq. 278.

(*d*) *Fletcher* v. *Fletcher*, 4 Hare, 67; *Brackenbury* v. *Brackenbury*, 2 J. & W. 391; *Cecil* v. *Butcher*, 2 J. & W. 565.

(*e*) *In re Booker*, 34 W. R. 346.

(*f*) 44 Vict. c. 12, s. 38. See post, p. 502.

(*g*) 44 Vict. c. 12, s. 28.

*CHAPTER IV.

WHEN AND TO WHAT EXTENT THE ABSENCE OF A VALUABLE CONSIDERATION WILL INVALIDATE A COMPLETE VOLUNTARY DISPOSITION OF PROPERTY.

Voluntary settlements as binding as those for value,

VOLUNTARY settlements, when once they are complete apart from any questions of actual or statutory fraud, are as binding as if they had been made for a valuable consideration.

Trustees of a voluntary deed are therefore liable for breaches of trust as much as if they were the trustees of a deed for value (*h*), even though the trust was created by a voluntary gift of the trustees themselves (*i*). Their conduct must be regarded in the same way, whether the trust was created for valuable consideration or from motives of benevolence (*i*).

So the donee of a power created by himself without consideration is as much bound by the rules of equity as if the power had been created by any other person (*k*).

unless void under statutes of Elizabeth, or Bankruptcy Acts, or for fraud.

The want of consideration may make a disposition of property void against *creditors* under 13 Eliz. c 5 (*l*), or the Bankruptcy Acts (*m*), or against *purchasers* under 27 Eliz. c. 4 (*n*); and voluntary gifts are also liable to be set aside on account of fraud in the way in which they were obtained (*o*).

In most instances, however, if the gift is once fully and validly and perfectly affected (*p*), the want of consideration is of no importance.

(*h*) *Smith* v. *French*, 2 Atk. 243; *Lanham* v. *Pirie*, 2 Jur. (N.S.) 753, S. C. 3 Jur. (N.S.) 704.

(*i*) *Drosier* v. *Brereton*, 15 Beav. 221. See *Stone* v. *Stone*, L. R. 5 Ch. 74.

(*k*) *Topham* v. *Duke of Portland*, 11 W. R. 507; *Daubeny* v. *Cockburn*, 1 Mer. 626.

(*l*) Ante, pt. ii.

(*m*) See now 46 & 47 Vict. c. 52, s. 47 (1); ante, pp. 12, 42 et seq.

(*n*) Ante, pt. iii.

(*o*) Post, pt. v. ch. v.

(*p*) Ante, pp. 402 et seq.

[*461] "There are, no doubt," said Lord Romilly, M. R., in *Dickinson* v. *Burrell* (*q*), "various circumstances which may be connected with a voluntary deed which will induce this Court either to set the deed aside or to refuse to execute the trusts contained in it. There are also statutory enactments which may defeat a voluntary deed which would be otherwise valid; but, assuming a voluntary deed to be complete, bonâ fide, and valid, and to be unaffected by any statutory disability I know of no distinction between such a deed and one executed for valuable consideration. The estates and limitations created in such a deed have the same operation and effect as in a deed executed for value, and must be construed in the same manner; and it carries with it all the same incidents and rights attached to the property conveyed as are carried by a deed executed for value; and the grantee, in this respect, stands exactly in the same situation as if he had paid value for the property conveyed." Complete voluntary deed construed like a deed for value.

The Court has no discretion to prevent a person of full age and sound mind from making a voluntary gift even though he thereby strips himself of all his property, except in cases of *undue influence* (*r*). In the absence of proof of this, the donor's right to select the objects of his bounty, and the donee's right to receive it, is incontrovertible; the donor is bound by his act, and the Court cannot interfere (*s*). Undue influence.

The law of this land, said James, L.J., in *Hall* v. *Hall* (*t*), permits any one to dispose of his property gratuitously, if he pleases, subject only to the special provisions as to subsequent purchasers and as to creditors.

Thus in *Villers* v. *Beaumont* (*u*), W. B., a little be- *Villers* v. *Beaumont.*

(*q*) L. R. 1 Eq. 343; and see *Rochfort* v. *Fitzmaurice*, 2 Dr. & War., per Sugden, C., at p. 20; *Sackville West* v. *Viscount Holmesdale*, L. R. 4 H. L. 554.

(*r*) Per Lord Eldon in *Huguenin* v. *Basseley*, 14 Ves. 290, 2 Wh. & Tu. L. C. 6th ed. 597 et seq.; and see *Toker* v. *Toker*, 31 Beav. 629, 644; *Armstrong* v. *Armstrong*, Ir. R 8 Eq. 1; *Phillips* v. *Mullings*, L. R. 7 Ch. 244; *Henry* v. *Armstrong*, 18 Ch. D. 668; *James* v. *Couchman*, 29 Ch. D. 212; post, pt. v. ch. v.

(*s*) *Hunter* v. *Atkins*, 3 My. & K. 113, per Lord Brougham, at p. 134.

(*t*) L. R. 8 Ch. 437.

(*u*) 1 Vern. 100; *Wright* v. *Moor*, 1 Rep. Ch. 84 [157]. As to subsequent disposal of property previously conveyed without consideration, see post, pp. 475, 476.

fore his death, by a little scrap of paper at an alehouse, [* 462] but under hand and seal, * settled a lease for years upon A. and B. to the intent to pay his debts, and gave the surplus to them. Afterwards, being dissatisfied with the settlement, which he had delivered out of his hands to a creditor, he attempted to dispose of the same property by will; and in support of the subsequent will it was insisted that the manner of obtaining this deed *carried with it* badges of fraud and circumvention, or surprise at least. The Lord Chancellor, however, said: "There is no colour in this case. If a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, this Court will not loose the fetters he hath put upon himself, but he must lie down under his own folly; for if you would relieve in such a case, you must establish this proposition—viz., That a man can make no voluntary disposition of his estate but by his will only, which would be absurd."

Lumley v. *Desborough.*

The principle that a voluntary settlement cannot be set aside in the absence of clear proof of fraud or surprise is well illustrated by the case of *Lumley* v. *Desborough* (*v*). The plaintiff filed his bill to impeach a post-nuptial settlement made by him, on the ground of fraud, alleging he did not then know A. B. was not his lawful wife. In 1847 he had married A. B., who described herself as a spinster. Some years after he separated from A. B., and then made in her favour the settlement in question. The settlement recited that A. B. was the wife of the plaintiff, and was made in consideration of natural love and affection, but contained no covenant to indemnify the plaintiff against A. B.'s debts (*w*). After the separation the plaintiff made inquiries as to A. B.'s previous marriage, and subsequently prosecuted her for bigamy in 1869, of which she was found guilty; but, on a point reserved, the conviction was quashed.

Sir J. Stuart, V.C., dismissed the bill, and said: "The rule of the Court is plain, that a voluntary instrument cannot be set aside by the settlor who made it, unless he can prove that it was executed under circumstances which amount to a fraud, or, in other words, that he was deceived in such a manner as to lead the

(*v*) 22 L. T. (N.S.) 597; *Pratt* v. *Barker*, 1 Sim. 1, S. C. 4 Russ. 507. But see *Robinson* v. *Dickenson*, 3 Russ. 399; post, p. 478.

(*w*) See ante, pp. 301 et seq.

* Court to the conclusion that the settlement [* 463] is no settlement at all. The mere recital in the deed of words of description which turn out to be inaccurate is not enough. It might be said that the defendant, Mrs. L., in executing a deed which describes her as the wife of Major L., knew at the time she signed it that she was not his lawful wife (*x*). But in order to support a case of that kind, the knowledge—or, at all events, the belief—that she was not his lawful wife must be shewn clearly."

Assignments in trust for *creditors* different.

There is no analogy between these cases and those in which property has been vested in trustees for *creditors*, and the assignment has neither been acted upon by nor communicated to the *creditors*. For, as Sir J. Leach said (*y*) *Wallwyn* v. *Coutts* (*z*) and *Garrard* v. *Lauderdale* (*a*), "so far from deciding that a cestui que trust becoming entitled under a voluntary settlement has not a good title, proceeded upon this, that the character of trustee and cestui que trust never existed between the creditors and the trustees of the trust deeds, but that the settlor himself was the only cestui que trust, and therefore that he was entitled to direct the application of his own trust fund."

Settlements void under statutes are good as between parties.

And even settlements which are actually or constructively fraudulent, either against creditors or purchasers, under the statutes of Elizabeth, are, as between the parties to them, and all persons claiming through them, unimpeachable (*b*).

This is expressly provided by the wording of the statutes (*c*).

(*x*) See *Wilkinson* v. *Joughin*, L. R. 2 Eq. 319.

(*y*) In *Bill* v. *Cureton*, 2 My. & K. 511. See *Paterson* v. *Murphy*, 11 Hare, 90; *Jones* v. *James*, 8 Ch. D. 744; and see ante pp. 433 et seq.

(*z*) 3 Mer. 707.

(*a*) 3 Sim. 1–12, where the same distinction was expressly recognized.

(*b*) Ante. pp. 67. 69, 298, 209.

(*c*) By 13 Eliz. c. 5, s. 2, conveyances, &c., are ("*only as against* that person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and relief, by such guilful, covinous, or fraudulent devices and practices as is aforesaid, are, shall, or might be in anywise disturbed, hindered, delayed, or defrauded") utterly void and of none effect. By 27 Eliz. c. 4, s. 2, all conveyances made to deceive purchasers shall be deemed and taken, *only as against* that person and persons, bodies politic and corpor-

So a transaction which comes within either of the [*464] statutes can *only* be upset by the persons thereby injured. No one but a *creditor* or his representative can take advantage of a disposition of property being void under the 13 Eliz. c. 5 (*d*). No one but a subsequent *purchaser* can claim the benefit of the 27 Eliz. c. 4, as against a conveyance void under that Act (*e*).

Although void as against them, the transaction is perfectly valid and binding between the parties themselves (*f*), and a deed void against purchasers or creditors is valid for all other purposes (*g*), unless the transaction is so tainted by fraud as to necessitate the avoidance of the transaction in toto, in order to work justice between the parties (*h*).

Voluntary settlement, by person indebted, only void against *creditors*.

A voluntary settlement made by a person "indebted," and therefore constructively fraudulent within 13 Eliz. c. 5, is void only as against creditors; and only to the extent to which it may be necessary to deal with the estate for their satisfaction as if it had never been made. To every other purpose it is good. Satisfy the creditors and the settlement stands. The Court frequently is obliged to sell the whole property settled; but the whole proceeds are not necessarily applicable (*i*). So where an annuity had been settled by a man on his wife, in fraud of his creditors, it was provided by the decree declaring the annuity void against creditors that it was to be without prejudice to any claim on the part of the wife with respect to the annuity if there should ultimately be a surplus after payment of creditors (*k*).

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ate, his and their heirs, successors, executors, administrators, and assigns, and against all and every other person or persons lawfully having or claiming by, from, or under them, or any of them, which have purchased, &c., utterly void, &c.

(*d*) *Lake* v. *Billers*, 1 Ld. Raym. 733; *Bessy* v. *Windham*, 6 Q. B. 166; *White* v. *Morris*, 11 C. B. 1015, ante, p. 172; *Steel* v. *Brown*, 1 Taunt, 381; *Robinson* v. *M'Donnell*, 2 B. & Ald. 134; *Sims.* v. *Taffs*, 6 Cr. & P. 207; et infra, *Rice* v. *Serjeant*, 7 Mod. 37. As to who are creditors, see ante, pp. 163 et seq.

(*e*) *Croker* v. *Martin*, 1 Bli. N. R. 573 et infra; *Doe* v. *Rusham*, 17 Q. B. 723, 733. As to who are purchasers, see ante, pp. 217 et seq.

(*f*) 3 Com. Dig. 296; *Pauncefoot* v. *Blunt*, 3 Rep. 82 a; *Shaw* v. *Jeffery*, 13 Moo. P. C. 432; *Reed* v. *Thoyts*, 6 M. & W. 410.

(*g*) *Curtis* v. *Price*, 12 Ves. 89, 103; ante, p. 68.

(*h*) *Tarleton* v. *Liddell*, 17 Q. B. 390, 418–9; ante, p. 264.

(*i*) Per Sir W. Grant in *Curtis* v. *Price*, 12 Ves. 89, 103; *Tanqueray* v. *Bowles*, L. R. 14 Eq. at p. 157; ante, p. 68.

(*k*) *French* v. *French*, 6 De G. M. & G. 95, 103, *Gardiner* v. *Shannon*, 2 Sch. & Lef. 230.

And a voluntary deed by a bankrupt, though void against creditors, subsist for all other purposes, so that any surplus would be subject to the trusts of it (*l*). By bankrupt.

Under the Bills of Sale Act, 1878, such [465] deed is, if not duly registered, void only as against the persons specified in that Act (*m*), and also is liable to be postponed to another subsequent deed registered before it (*n*). Under the Bills of Sale Act, 1882 (*o*), such deed, if not duly registered, is absolutely void against *all* persons, even against the grantor, in respect of the personal chattels comprised therein (*p*). Effect of want of registration under Bills of Sale Acts.

Under the 27 Eliz. c. 4, a voluntary conveyance is of course valid between the parties, until there is some one qualified to take advantage of the statute as a subsequent bonâ fide *purchaser* for value; and the voluntary deed is only void against such a purchaser so far as is necessary to give full effect to the interest conveyed to him (*q*). Under 27 Eliz. c. 4.

Thus where a man made a voluntary settlement of certain lands on himself and on his eldest son, and subsequently on the marriage of the son resettled the property on himself and him, the son having died without issue, and the trusts of the marriage settlement being fully performed and satisfied, it was held, that the first settlement was a purely voluntary settlement binding against the settlor, but not against a conveyance on valuable consideration, which the marriage settlement was (*r*); yet that the marriage settlement only prevailed over the first deed to the extent of the limitations in it in favour of the parties who took under it as purchasers for value, and no further; and therefore, that although it was provided by an express stipulation in the marriage settlement that, after all the interests which were thereby created were satisfied, the estate should revert to the settlor, that estate would be held by the settlor subject to the trusts of the voluntary deed, which, though not binding as against a purchaser, was binding against him and against his voluntary dispositions (*s*). Voluntary trusts subsist subject to the rights of *purchasers*.

(*l*) *Ex parte Bell*, 1 Gl. & J. 282; 46 & 47 Vict. c. 52, s. 40 (5).
(*m*) 41 & 42 Vict. c. 31, s. 8; ante, p. 136.
(*n*) 41 & 42 Vict. c. 31, s. 10 (4); *Conelly* v. *Steer*, 7 Q. B. D. 520; *Lyons* v. *Tucker*, 7 Q. B. D. 523; ante, pp. 154, 155.
(*o*) 45 & 46 Vict. c. 43, s. 8; ante, p. 140.
(*p*) Ante, pp. 140, 162. (*q*) Ante, pp. 208, 209. (*r*) Ante, p. 222.
(*s*) *Croker* v. *Martin*, 1 Bli. N. R. 573; Sug. L. of Prop. 148.

Voluntary settlement only displaced pro tanto.

Except so far as regards any benefit (as a life in- [* 466] terest) taken * by the settlor under the limitations of the settlement, which would of course be in general subject to his full powers of disposition, a voluntary settlement of land gives rights to the volunteers, which can only be displaced by the settlor conveying for valuable consideration the same estates to others, who would take as purchasers, whether it were an out-and-out purchase or whether it were a mortgage. By virtue of the statute 27 Eliz. c. 4, the settlor is able to defeat the settlement which he has created so far as the purchase of the mortgage extends. Not on account of any favour shewn him, nor because the deed itself was as to him invalid. On the contrary, he could in no wise invalidate the deed except by creating such an interest in others. And on behalf of the mortgagee or purchaser the statute intervenes, and says, that as to any purchaser the deed shall be invalidated to the extent of the interest of that purchaser. It leaves all those who were interested under the voluntary settlement in exactly the same position in which they were originally placed when the settlement was executed, except that they are displaced to the extent to which the sale or mortgage displaces them (*t*).

Part of settled lands sold.

Where only part of the land settled has been subsequently sold, the settlement remains good as to the unsold portion (*u*). But, of course, as to so much of the land as is actually sold, the voluntary alienation becomes utterly void and of no effect, and the volunteer has no right to the land sold on paying the purchaser what he gave for it; and cannot claim the purchase-money from the settlor as being subject to the trusts of the settlement (*v*).

Thorne v. *Newman*. Volunteers allowed to redeem land sold on payment of purchase and other money paid.

The old case of *Thorne* v. *Newman* (*w*), however, would seem to warrant such a supposition, if the report can be relied on, according to which the bill was filed to set aside a pretended voluntary conveyance made with power of revocation on the tender of a shilling. [* 467] The shilling was tendered, but (it was * contended by the defendants) informally, and the plaintiff

(*t*) *Dolphin* v. *Aylward*, L. R. 4 H. L. 499–500: per Lord Hatherley, L. C.; see *In re Walhampton Estate*, 26 Ch. D. 391, 393; post, pt. vi. ch. i.; ante, p. 208.

(*u*) *Williamson* v. *Codrington*, 1 Ves. 515; post, pt. vi. ch. i.

(*v*) *Pulvertoft* v. *Pulvertoft*, 18 Ves. 91; *Daking* v. *Whimper*, 26 Beav. 568; *Townend* v. *Toker*, L. R. 1 Ch. 446; ante, p. 208.

(*w*) Finch, 38.

became a purchaser of the premises, first, by a mortgage for £500, and afterwards by an absolute assignment, in consideration of £770 more paid. He had also laid out money in repairs and building, and prayed to have the voluntary deed set aside, but the defendants praying a redemption of the premises, upon payment of the said sums of money with interest, together with the money laid out in building and repairing, "It was ordered that the Master should compute the same, and what profits the plaintiff or any other person for his use had received, and he to account for all wilful spoils and wastes done; and upon payment of what shall appear to be due the plaintiff should assign the premises to the defendant; but in default of payment then the plaintiff was to hold the premises against the defendants and all claiming under them by the said deed." This was at the Rolls, and upon appeal the Lord Chancellor confirmed this decree.

Volunteer may redeem mortgage.

In the ordinary case of property being settled voluntarily, and afterwards mortgaged by the settlor, the volunteer has a perfectly valid title subject to the mortgage.

Thus in *Rand* v. *Cartwright* (*x*) a man made a voluntary deed and then a mortgage of the same lands. It was held that, though the first deed was fraudulent, because voluntary, quoad the mortgage-money, and pro tanto, yet that it was good as to the equity of redemption, and would pass that; for that a voluntary deed will bind the party that makes it and his heirs.

And the volunteers are equally entitled to redeem a subsequent mortgage, where the deed under which they claim contains a power of revocation (*y*).

Surplus proceeds of sale of land mortgaged and then settled subject to trusts.

If land subject to a mortgage be made the subject of a voluntary settlement, any surplus proceeds, after a sale of it by the mortgagee under his power of sale, is subject to the trusts of the settlement (*z*).

And where, after a settlement of freeholds, [468]

(*x*) Nels. 101, 1 Ca, Ch. 59; and see *Roscarrick* v. *Barton*, 1 Ca. Ch. 217; *Howard* v. *Harris*, 1 Vern. 190, 193; *Girling* v. *Lowther*, Vin. Abr. vol. 22, p. 22, F. 1; *Jones* v. *Baugh*, ibid. E. 1.

(*y*) *Perkins* v. *Walker*, 1 Vern. 97; *Thorne* v. *Thorne*, ibid. 141.

(*z*) *In re Walhampton Estate*, 26 Ch. D. 391.

Marshalling. the settlor mortgaged the property together with unsettled estates of his own, it was held that the volunteers were entitled to throw the mortgage primarily upon the unsettled estates; and the settlor having bought from one of the volunteers his share and resettled it voluntarily subsequently to the mortgage, the persons claiming under the resettlement were also allowed to throw the mortgage primarily on the unsettled estates (*a*).

Sale by a vendor intending a mortgage.

Where there is any fraud in representing to the vendor that the transaction was a mortgage instead of an absolute sale, inasmuch as the volunteers would be entitled to all the settlor's rights as to the settled property, subject to his dealing with it for value, it is conceived that they would be entitled to have the conveyance declared to be only a mortgage for the amount of the purchase-money, and that the settlement would be valid subject to the mortgage (*b*).

A conveyance void against purchasers may be a breach of a covenant not to assign (*c*).

Voluntary deeds void in creation.

Even a deed voluntary in form, the consideration for which arises ex turpi causâ, is good in equity where there is no creditor (*d*). So where a settlement of shares was made upon a stranger and the shares were duly transferred to the trustees, the Court would not set it aside at the instance of the settlor or his legal personal representative, even when it was made for an illegal consideration which did not appear on the face of the deed (*e*).

Contracts founded on immoral considerations are absolutely void. So a fund settled in trust for after-born illegitimate children was ordered to be transferred to the settlor as against such children, on the ground that such a provision is void (*f*). In the same manner contracts founded on or inducive of *future* illicit [* 469] *cohabitation or void (*g*); whereas those

(*a*) *Hales* v. *Cox*, 32 Beav. 118; *Anstey* v. *Newman*, 39 L. J. (N.S.) Ch. 769; post, pt. vi. ch, i.

(*b*) See *Douglas* v. *Culverwell*, 3 Giff. 251.

(*c*) *Gewen* v. *Roll*, Cro. Jac. 132.

(*d*) Per Hale, B., in *Carey* v. *Stafford*, 3 Sw. 427, n., 429, n.

(*e*) *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275; commented on in *Pawson* v. *Brown*, 13 Ch. D. 202.

(*f*) *Wilkinson* v. *Wilkinson*, 1 Y. & C. C. C. 657.

(*g*) *Walker* v. *Perkins*, 3 Burr. 1568; *Rex* v. *Inhabitants of Northwingfield*, 1 B. & Ad. 912; *Gray* v. *Mathias*, 5 Ves. 286; *Willyams* v. *Bullmore*, 32 Beav. 574; *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275; see Chitty, Cont. 11th ed. 613 et seq.

founded on *past* cohabitation or *past* seduction and cohabitation are merely voluntary (*h*). So an agreement for or inducive of *future* separation by husband and wife is void (*i*). So also contracts in encouragement or for the purposes of prostitution are void, as being contra bonos mores (*k*).

Voluntary contracts which clearly are injurious to the public interests are void on grounds of public policy. As, for instance, such as are in restraint of trade, whether general or particular (*l*), or for the creation of a monopoly (*m*), or in restraint of marriage (*n*).

A contract which is void on the ground of public policy may be set aside by one *particeps criminis* (*o*), but the voluntary *gift* of part of his own property by one *particeps criminis* to another is in itself neither fraudulent nor prohibited by law (*p*). The real distinction is between a contract that is executed and one that is executory (*q*).

A party to a contract which is fraudulent [470]

(*h*) *Knye* v. *Moore*, 2 S. & S. 260; *Beaumont* v. *Reeve*, 8 Q. B. 483; and see *Hall* v. *Palmer*, 3 Hare, 532; *Lumley* v. *Desborough*, 22 L. T. (N.S.) 597; *Ayerst* v. *Jenkins*, L. R. 16 Eq. 282, per Lord Selborne, L. C.; notwithstanding the earlier cases of *Binnington* v. *Wallis*, 4 B. & Ald. 650, 652; and *Friend* v. *Harrison*, 2 C. & P. 584.

(*i*) *Westmeath* v. *Westmeath*, Jac. 126, 1 Dow. & Cl. 519; and see *Swift* v. *Swift*, 34 Beav. 266; ante, p. 312.

(*k*) See *Girardy* v. *Richardson*, 1 Esp. 13; *Howard* v. *Hodges*, 1 Selw. N. P. 13th ed. 80; *Lloyd* v. *Johnson*, 1 B. & P. 340; *Appleton* v. *Campbell*, 2 Car. & P. 347; *Jennings* v. *Throgmorton*, Ry. & Mood. 251; *Pearce* v. *Brooks*, L. R. 1 Ex. 213; *Smith* v. *White*, L. R. 1 Eq. 626: *Taylor* v. *Chester*, 10 B. & S. 237; *Herman* v. *Jeuchner*, 15 Q. B. D. 561; Chitty, Cont. 11th ed. 614.

(*l*) *Hilton* v. *Eckersley*, 6 E. & B. 47, 74–5; *Wood* v. *Bowron*, L. R. 2 Q. B. 21; and see *Harms* v. *Parsons*, 32 Beav. 328; *Collins* v. *Locke*, 4 App. Cas. 674; *Mitchell* v. *Reynolds*, 1 Sm. L. C. 8th ed. 417 et seq.

(*m*) *Duvergier* v. *Fellowes*, 10 B. & C. 826; *Mitchell* v. *Reynolds*, 1 P. Wms. 181–185, 1 Sm. L. C. 8th ed. 417* et seq.; *Young* v. *Timmins*, 1 Tyrw. 226, 241; *Homer* v. *Ashford*, 3 Bing. 322; *Hitchcock* v. *Coker*, 6 Ad. & E. 438, 456; *Farrer* v. *Close*, 10 B. & S. 553; Chitty, Cont. 11th ed. 615 et seq.

(*n*) *Lowe* v. *Peers*, 4 Burr. 2225, Wilm. 364; *Baker* v. *White*, 2 Vern. 215; *Woodhouse* v. *Shepley*, 2 Atk. 540. See *Scott* v. *Tyler*, 2 Wh. & Tu. L. C. 6th ed. 120 et seq.

(*o*) *Vauxhall Bridge Co.* v. *Earl Spencer*, 2 Mad. 356, and cases there cited; *Sharp* v. *Taylor*, 2 Phil. 801; *Macgregor* v. *Dover and Deal Railway Co.*, 18 Q. B. 618; *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275.

(*p*) *Ayerst* v. *Jenkins*, L. R. 16 Eq. 283.

(*q*) *Whaley* v. *Norton*, 1 Vern. 483; *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275.

Fraus contra alios irrita contra fraudatores valet.

as against third persons cannot excuse himself from performing his part of the agreement by alleging that it was fraudulent and void (*r*).

So where a transaction has been entered into between two parties for a purpose fraudulent against some third person, it may yet be binding between the parties. As between them it must be examined and looked at in the usual way, and construed without reference to the supposed fraudulent intention against third persons (*s*); for a man cannot set up an illegal or fraudulent act of his own in order to avoid his own deed (*t*).

Sims v. *Tuffs*.

Where a tenant of B. had paid all his rent, and got his landlord's receipt for it, but fearing execution by a creditor, agreed with B., the landlord, to destroy the receipt, and that B. should put in a distress for rent, and he did so, and sold the goods and kept the proceeds, it was held that the parties were in pari delicto; that the plaintiff (the tenant) could not be assisted in the recovery of the proceeds of the sale; they were both contemplating a fraud, and the transaction must be taken to be valid between them though a fraud on a third person (*u*).

Statute of Frauds cannot be set up to cover a fraud.

Nor can a defendant to whom a voluntary conveyance of property has been made set up the Statute of Frauds as an answer to the case that he is merely a trustee of that property for the plaintiff. The Court will not allow a man to take advantage of the Statutes of Frauds to keep another man's property which he has obtained through fraud (*v*).

This principle, that a man cannot set up his own

(*r*) *Hawes* v. *Leader*, Cro. Jac. 270, 1 Brownlow, 111, Yelv. 196, 3 Com. Dig. 296, Lofft, 427; *De Metton* v. *De Mellon*, 2 Camp. 420, 12 East, 234; *Worthington* v. *Curtis*, 1 Ch. D. 419; et vide supra as to conveyances fraudulent within the statutes of Elizabeth.

(*s*) *Shaw* v. *Jefferys*, 13 Moo. P. C. 432, 454–5; *Phillpotts* v. *Phillpotts*, 10 C. B. 85.

(*t*) *Watts* v. *Brooks*, 3 Ves. 612–3; *Roberts* v. *Roberts*, Dan. 143; *Ex parte Meymot*, 1 Atk. 196; *Cottington* v. *Fletcher*, 2 Atk. 155–6; *Irnham* v. *Child*, 1 Bro. C. C. 92; *Curtis* v. *Perry*, 6 Ves. 739, 747; *Bessey* v. *Windham*, 6 Q. B. 166; *Phillpotts* v. *Phillpotts*, 10 C. B. 85, which was a fictitious conveyance to give a note in a parliamentary election; and see *In re South Wales Atlantic Steamship Co.*, 2 Ch. D. 763; Chitty, Cont. 11th ed. 630.

(*u*) *Sims* v. *Tuffs*, 6 C. & P. 207.

(*v*) *Childers* v. *Childers*, 1 De. G. & J. 482; *Davies* v. *Otty*, 35 Beav. 208; *Lincoln* v. *Wright*, 4 De. G. & J. 16; *Haigh* v. *Kaye*, L. R. 7 Ch. 469.

fraud to avoid his own deed, is not confined to the statutes of Elizabeth. A man may not set up his own fraud.

* So where a man, to enable his brother to [* 471] represent himself as a man of property, and to carry on a marriage treaty, gave him a note for a large sum as the balance between them, it was held (the marriage being had) that the note was binding between them (*w*). So in *Roberts* v. *Roberts* (*x*) it was held that a deed made for the purpose of giving a qualification to shoot game, and which had never been acted upon, but was prepared and executed with the knowledge of the grantee, and was delivered to him, the title deeds, however, and profits of the land being retained by the grantor, could not be set aside nor a reconveyance compelled.

In *Birch* v. *Blagrave* (*y*), however, a man made a secret conveyance of land to his daughter and remained in possession of the estate conveyed, and retained the deed himself. It was proved that he executed the deed to avoid being sheriff of London by putting the legal interest out of himself so that he might swear that he was not worth £15,000, but he afterwards changed his mind and paid the fine. It was held that this voluntary deed was avoided by his subsequent devise of the lands. Lord Hardwicke said cases of this sort stand on their own circumstances. That as he had not, by taking the oath, *actually committed a fraud*, and had done it under the mistaken impression that by putting the legal estate out of himself he could take the oath, and had no intention of parting with the beneficial interest, the conveyance ought not to take effect against him unless he had actually taken the oath; that would have been against conscience and in fraud of the law; as in the case of Colonel Pitt. He sat in Parliament by virtue of the conveyance. Suppose George Pitt had found his mistake and repented of it before he had carried his intention into execution, and Colonel Pitt had not been in Parliament, a contrary determination would have prevailed. *Birch* v. *Blagrave.*

The mere fact that an assignment has been made for an illegal purpose does not, of itself, prevent the Court, at the instance of the assignor, from interfering.

(*w*) *Montefiori* v. *Montefiori*, 1 W. Bl. 363.
(*x*) Dan. 143.
(*y*) 1 Amb. 264.

The true principle seems to be this. Where the purpose for which an assignment is made is not carried [* 472] into execution and * nothing is done under it, the *mere intention* to effect an illegal object when the assignment is executed does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it (*z*).

Complete voluntary deed only set aside on what grounds.

As a voluntary deed is binding on the settlor once that it has been duly completed, so, in general, it is immaterial whether the settlor does or does not retain possession of the deed, and whether he does or does not communicate the gift to the grantee (*a*)

It is only upon special grounds that a complete voluntary deed can be set aside.

Such a deed may be set aside, if it has only been executed by the grantor for a particular purpose of his own, not carried out, has never been out of his possession, and has been kept secret (*b*). Such a deed is executed *not* for the benefit of the donees, but for a special purpose of the donor; and resembles trusts for creditors in this respect (*c*).

Cecil v. *Butcher*. Gift for qualification to kill game.

In *Cecil* v. *Butcher* (*d*) there was a conveyance of land by a father to his son for the single purpose of qualifying the son to kill game. The deed was retained by the father in his own possession, and the transaction was never communicated to the son, nor was it acted on. The father died, making another provision for his son, and the deed was not to be found; but the son, finding a copy of it, filed his bill in equity to have the benefit of the deed as having been lost.

Sir T. Plumer said the deed was for a special pur-

(*z*) *Symes* v. *Hughes*. L. R. 9 Eq. 475; and see *Taylor* v. *Bowers*, 1 Q. B. D. 291.

(*a*) Ante, p. 458; *Clavering* v. *Clavering*, 2 Vern. 473; *Boughton* v. *Boughton*, 1 Atk. 626; *Doe* v. *Knight*, 5 B. & C. 671; *Exton* v. *Scott*, 6 Sim. 31; *Hall* v. *Palmer*, 3 Hare. 532; *Re Way's Trusts*, 2 D. J. & S. 365; *Bonfield* v. *Hassall*, 32 Beav. 217; *Xenos* v. *Wickham*, L. R. 2 H. L. 323; Elph. Deeds, 120.

(*b*) *Ward* v. *Lant*, Prec. Ch. 210; *Birch* v. *Blagrave*, 1 Amb. 264; *Cecil* v. *Butcher*, 2 Jac. & W. 565; *Childers* v. *Childers*, 1 De G. & J. 482; *Mitford* v. *Reynolds*, 16 Sim. 130; *Flower* v. *Martin*, 2 My. & Cr. 459.

(*c*) Ante, pp. 433 et seq.

(*d*) 2 Jac. & W. 565; and see *Callaghan* v. *Callaghan*, 7 Cl. & Sim. 374.

pose, and was only intended to be used for that purpose; that if the deed is complete, when it is a qualification to sit in Parliament, as in the case of Colonel Pitt (*e*), or to kill game, as in *Roberts* v *Roberts* (*f*), * the party cannot be heard to allege his own [* 473] fraudulent purpose; it being a fraud on the law to attempt to give another a qualification without making him owner of the estate, he is estopped from confining the operation of his deed by avowing that he had such a purpose. But where the deed is voluntary, retained by the donor, made for a particular purpose, and for a purpose which has never been completed, the question is, whether there is not a locus pœnitentiæ. After minutely reviewing the previous authorities, his Honour said that difficult as it may be to extract a principle from the cases, yet he thought "there is a great preponderance of authority in support of the proposition, that where a voluntary deed is made without the knowledge of the grantee, for a special purpose for which it was never required to be made use of, when it has been kept in the hands of the grantor without ever being acted on, a Court of equity will not relieve upon it"—that is, will not enforce it, and this has been followed by Lord Eldon and other judges in cases of the kind (*g*).

Deed executed under mistake of law.

A voluntary deed may also be set aside, if it has been executed by the grantor under a bonâ fide mistake as to the law, to evade which it was made.

So in *Manning* v. *Gill* (*h*) a man about to be tried for felony executed a voluntary deed disposing of all his property, with the sole motive of defeating a forfeiture in the event (which did not happen) of his conviction. It was held that as the purpose for which alone the deed was executed had not taken effect, and as it was executed under a total misapprehension, the deed was wholly inoperative.

Possession of deed obtained by *fraud* of grantee.

Such a deed may also be ordered to be delivered up, if its possession has been obtained from the grantor by the fraud of the grantee or some one on his behalf.

(*e*) Cited by Lord Hardwicke in *Birch* v. *Blagrave*, 1 Amb. 264, 266, supra. p. 471.

(*f*) Dan. 143, et supra, p. 471.

(*g*) *Brackenbury* v. *Brackenbury*, 2 Jac. & W. 391. See *Ward* v. *Lant*, Prec. Ch. 182, a case of a bond given to screen the obligor from taxes; *Milford* v. *Reynolds*, 16 Sim. 130; *Childers* v. *Childers*, 1 De G. & J. 482; *Flower* v. *Marten*, 2 My. & Cr. 459.

(*h*) L. R. 13 Eq. 485; *Birch* v. *Blagrave*, Amb. 264; but see *Groves* v. *Groves*, 3 Y. & J. 175.

The principle upon which this rests seems to be that such a deed, so long as it was retained by the grantor, was revocable by him; and as it was only by the fraud [*474] of the grantee that it *became irrevocable, it must be treated as if the fraud had not been committed.

Voluntary instrument got from grantor by fraud.

In *Cotton* v. *King* (*i*) Lord King, in supporting a voluntary settlement as having been intended to put the property out of the settlor's power, said: "if she had executed these deeds and kept them in her own hands or custody, and they had been *got from thence*, I do not think she should been bound by them; so if they had been placed in the hands of her agent, for her agent's hands are her hands, and no other person privy to them." In *Naldred* v *Gilham* (*k*), A. made a voluntary settlement, with no power of revocation, on her nephew, keeping, the deed in her own power; afterwards one, secretly and by fraud, on behalf of the nephew, gets an attested copy of this settlement; A. then burns the settlement, and settles the premises on another nephew; bill to establish the attested copy was dismissed, and on another bill by second nephew the attested copy was decreed to be delivered up, as having been indirectly gained.

In one case (*l*) a voluntary assignment of a chose in action retained by the donor, but to which the donee was privy, was held to be revocable by the donor on account of her retention of it; but there was no proof of the exact contents of the deed, and there *was* proof that the donor intended the deed to be ambulatory until her death, and revocable like a will (*m*).

Remarks on *Naldred* v. *Gilham*.

Of course if there has been any fraud on the part of the grantee in procuring the deed, the Court will not allow him to retain any beneficial interest in it (*n*).

The case of *Naldred* v. *Gilham* (*k*), as Sir John Bayley remarked in delivering the judgment of the Court of King's Bench in *Doe* v. *Knight* (*o*), was not deter-

(*i*) 2 P. Wms. 358–9, 2 Eq. Ca. Ab. 53 pl. 10, and *King* v. *Cotton*, 2 P. Wms. 674 Mos. 259.
(*k*) 1 P. Wms. 577.
(*l*) *Uniacke* v. *Giles*, 2 Moll. 268.
(*m*) *Perrott* v. *Perrott*, 14 East, 423.
(*n*) *Young* v. *Peachey*, 2 Atk. 254; *Wilkinson* v. *Brayfield*, 2 Vern. 307.
(*o*) 5 B. & C. 671–691.

mined on the ground that the deed was not well executed, or that it was not binding because Mrs. Naldred had kept it in her possession. It was determined because it was plain that Mrs. Naldred intended to keep *the estate* * in her own power; that she designed [*475] that there should have been a power of revocation in the settlement (*p*); that she thought while she had the deed in her custody she had also the estate at her command; that in fact she had been imposed upon by the deed being made an absolute conveyance, which was unreasonable, when it ought to have had a power of revocation.

Delivery to third person.

It is clear that a delivery to a third person for the use of the party in whose favour the deed is made, where the grantor parts with all control over the deed. makes the grant effectual (*q*).

When donor has a locus pœnitentiæ.

The cases in which the donor has a locus pœnitentiæ are those in which he has made an ineffectual attempt to pass the legal interest (*r*), or has validly vested the property in trustees, and has not as yet declared the trusts (*s*), or has executed, but retained in his power, a deed executed for a particular purpose of his own and not for the benefit of the grantees (*t*).

Destroping the deed.

The grantor in a voluntary deed, which has been kept in his own possession, cannot release himself from it by tearing it up, or burning it, unless of course the gift was imperfect (*u*); for the deed may be proved aliunde (*v*); and this, although the trustees have been induced to re-transfer the fund to the grantor (*w*).

Nor can the grantor undo his gift by making a fresh

(*p*) Vide post, pp. 498 et seq.

(*q*) Shep. Touch. 57; *Taw* v. *Bury*, Dyer, 167 b, 1 Anders. 4, 2 Roll. Abr. 24, pl. 7; *Alford* v. *Lea*, Cro. Eliz. 54, 2 Leon. 111; *Doe* v. *Knight*, 5 B. & C. 692.

(*r*) *Antrobus* v. *Smith*, 12 Ves. 39, ante, pp. 413, 414.

(*s*) *Re Syke's Trusts*, 2 J. & H. 415; and other cases, ante, p. 431.

(*t*) Ante, pp. 472 et seq.

(*u*) *Antrobus* v. *Smith*, 12 Ves. 39, ante, p. 412; *Uniacke* v. *Giles*, 2 Moll. 257, 265, 268, ante, p. 474; *Naldred* v. *Gilham*, 1 P. Wins, 577; *Xenos* v. *Wickham*, L. R. 2 H. L. 323; Elph. Deeds, 120; Kerr, Fraud and Mis., 2nd ed. 439.

(*v*) *Brookbank* v. *Brookbank*, 1 Eq. Ca. Ab. 168; *Smith* v. *Lyne*, 2 Y. & C. C. C. 345; *Lanham* v. *Pirie*, 2 Jur. (N.S.) 753, S. C. 3 Jur. (N.S.) 704; *Re Way's Trusts*, 2 D. J. & S. 365; and see *In re Booker*, 34 W. R. 346.

(*w*) *Smith* v. *Lyne*, 2 Y. & C. C. C. 345; ante, p. 459.

Subsequent dispositions by grantor.

disposition of the property, unless, if the subject of the gift is within 27 Eliz. c. 4 (*x*), he sells it for value (*y*). If the property is within 27 Eliz. c. 4 (*x*), the voluntary disposition will prevail against any subsequent voluntary disposition (*z*); and if the property is not within 27 Eliz. c. 4, it will be good against any subse- [* 476] *quent disposition, whether by will or by gift inter vivos, and whether voluntary (*a*) or for value (*b*).

But where a man settles property on himself for life and after his decease upon trust to pay *all the debts then owing by him*, and subject thereto in trust for the volunteers, he can defeat the settlement by creating voluntary debts by bond or other instrument under seal (*c*). In fact a voluntary debt may, under 13 Eliz. c. 5, avoid a subsequent voluntary deed (*d*). Where two trust deeds were executed with respect to the same sum of stock, which was transferred into the names of the trustees, it was held that the first deed was not affected by the second, and that the second deed failing to operate gave no claim against the assets of the settlor (*e*). But where the first voluntary deed was imperfect (*f*), or obtained by fraud (*g*), a second voluntary deed will prevail against it.

Settlor not assisted in defeating his own gift.

Nor will the Court in any manner assist a man to defeat his own voluntary grant by enforcing at his instance a contract for the sale of lands which he has previously conveyed without consideration (*h*).

(*x*) Ante, pp. 202 et seq. (*y*) Ante, pt. iii. ch. i.

(*z*) *Doe* v. *Rusham*, 17 Q. B. 723–733; ante, p. 240; see next note.

(*a*) *Goodwin* v. *Goodwin*, 1 Ch. Rep. [173] 92; *Villers* v. *Beaumont*, 1 Vern. 100, ante, p. 461; *Franklin* v. *Thornebury*, ibid. 132; *Bale* v. *Newton*, ibid. 464; *Clavering* v. *Clavering*, 2 ibid. 473; *Chadwick* v. *Doleman*, ibid. 530; *Ward* v. *Lant*, Prec. Ch. 182; *Boughton* v. *Boughton*, 1 Atk. 625; *Taylor* v. *Jones*, 2 Atk. 600 and note; *Sear* v. *Ashwell*, 3 Sw. 411; *Bolton* v. *Bolton*, ibid. 414; *Newton* v. *Askew*, 11 Beav. 145; *Scott* v. *Scott*, 11 Ir. Eq. 487.

(*b*) *Vernon* v. *Valden*, Appendix No. VI.; *Kekewich* v. *Manning*, 1 De G. M. & G. 176.

(*c*) *Markwell* v. *Markwell*, 34 Beav. 12.

(*d*) *Adames* v. *Hallett*, L. R. 6 Eq. 468; and other cases, ante, pp. 166, 167, 398.

(*e*) *Newton* v. *Askew*, 11 Beav. 145; and see *Smith* v. *Lyne*, 2 Y. & C. C. C. 345.

(*f*) Anon. case, Appendix No. XII.; *Beatson* v. *Beatson*, 12 Sim. 281; *Gaskell* v. *Gaskell*, 2 Y. & J. 502.

(*g*) *Naldred* v. *Gilham*, 1 P. Wms. 577; *Dickinson* v. *Burrell*, L. R. 1 Eq. 337.

(*h*) *Smith* v. *Garland*, 2 Mer. 123; *Clarke* v. *Willott*, L. R. 7 Ex. 318; *General Meat Supply Association* v. *Bouffler*, 40 L. T. (N.S.) 126, S. C. 41 L. T. (N.S.) 719; post, pp. 511, 512.

Voluntary deeds to take effect on marriage, when binding.

It has been laid down that a man (*i*) or woman (*k*) cannot recall a voluntary deed executed by him or her when unmarried, not in contemplation of any marriage in particular, but declaring trusts in favour of any future wife or husband and children. It is conceived, however, that such a deed cannot stand against a settlor * who has executed it when very young, [* 477] unless it can be clearly proved that the settlor perfectly understood the nature of the deed; and that any extraordinary clauses in it were brought to his notice, explained to, and understood by, him (*l*).

Marriage settlement when merely voluntary.

A settlement made in consideration of a marriage with a deceased wife's sister (which is void because the parties are within the prohibited degrees) stands on the same footing as a voluntary settlement (*m*).

Where, in contemplation of a *particular* marriage, property is conveyed to trustees upon trust for the settlor till the solemnization of the marriage, and after upon other trusts, and the marriage can never take place, as those subsequent trusts can arise only upon an event which can never occur, the trustees hold the property upon trust for the settlor (*n*). And where the *particular* marriage was never solemnized, but the parties cohabited and had children, it was held that, as the contract to marry had been absolutely put an end to, the trusts declared after the solemnization of the marriage had become inoperative and the settlor was entitled to have the property vested in the trustees re-transferred to her (*o*).

The Court will not permit the parties to revoke a settlement simply because they desire to make differ-

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(*i*) *Petre* v. *Espinasse*, 2 My. & K. 496.

(*k*) *Bill* v. *Cureton*, 2 My. & K. 503.

(*l*) *Everitt* v. *Everitt*, L. R. 10 Eq. 405; *Phillips* v. *Mullings*, L. R. 7 Ch. 244; *James* v. *Couchman*, 29 Ch. D. 212; and see *Beatson* v. *Beatson*, 12 Sim. 281; *Prideaux* v. *Lonsdale*, 1 D. J. & S. 433; *Jarratt* v. *Aldam*, L. R. 10 Eq. 463; post, pp. 480, 481.

(*m*) *Chapman* v. *Bradley*, 33 Beav. 61, S. C. 4 D. J. & S. 72; *Brook* v. *Brook*, 3 Sm. & G. 481, 9 H. L. C. 193; *Seale* v. *Lowndes*, 17 L. T. (N.S.) 555; and see *Ayerst* v. *Jenkins*, L. R. 16 Ep. 275.

(*n*) *Chapman* v. *Bradley*, 33 Beav. 61, S. C. 4 D. J. & S. 72; *Pawson* v. *Brown*, 13 Ch. D. 202; *H.* v. *M.*, 10 P. D. 178; Elph. Deeds, 331, 332; Banning. Marr. Sett. 233 et seq.; ante, p. 334.

(*o*) *Essery* v. *Cowlard*, 26 Ch. D. 191, ante, pp. 334. 341; and see *Thomas* v. *Brennan*, 15 L. J. (N.S.) Ch. 420; *M'Donnell* v. *Hesilrige*, 16 Beav. 346; *Milford* v. *Reynolds*, 16 Sim. 130; and see Macqueen, H. & W. 3rd ed. 243 et seq.

ent terms from what they desired at the time the settlement was executed (*p*).

So where a settlement of the intended wife's property was made in contemplation of a *particular* marriage, and the day before the marriage she, and the intended husband, executed a deed poll purporting to revoke that settlement, it was held by Lord Langdale, M.R., that the settlement was not revoked (*q*).

[* 478] * But in *Bond* v. *Walford* (*r*) the intended wife and her father executed the engrossment of her settlement, which was kept by the solicitors of the intended husband, by whom, as well as by the proposed trustees, it was never executed. The engagement was broken off by mutual consent a few months after. Three and a half years afterwards, on action brought by the lady, the deed was declared void, upon the ground that, even if a marriage did take place between the parties, it would take place under such different circumstances that it would not be the marriage then intended.

In *Robinson* v. *Dickenson* (*s*) a lady, after a marriage (as to the validity of which there was no doubt at the time), suffered a recovery and made a settlement of her real estate, in pursuance of an ante-nuptial agreement. It was afterwards discovered, before the birth of issue, that the marriage was void; whereupon, on the supposition that the first settlement was void, a second recovery was suffered and settlement executed, and they were afterwards validly married. It was held that although the first recovery and settlement were valid at law (*t*), yet in equity the first settlement being founded on misapprehension, was not binding on the parties, and that the rights of the issue were regulated by the second settlement (*u*).

To which settlement does consideration of marriage attach?

These, however, are not simple cases of successive voluntary settlements; they are embarrassed by the question, whether the first settlement *was* voluntary, or whether the estates limited to take effect on the marriage being solemnized would not come into force on

(*p*) *Bond* v. *Walford*, 32 Ch. D., per Pearson, J., 238.
(*q*) *Page* v. *Horne*, 9 Beav. 570, S. C. 11 Beav. 227.
(*r*) 32 Ch. D. 238.
(*s*) 3 Russ, 399.
(*t*) *Boughton* v. *Sandilands*, 3 Taunt. 342.
(*u*) S. C. in Ch. as *Robinson* v. *Dickenson*, 3 Russ. 399; but see *Lumley* v. *Desborough*, 22 L. T. (N.S.) 597; ante, p. 462.

that same marriage being solemnized at any future time, and be supported by it (*v*) It is apprehended that the consideration of the marriage cannot extend to *both* the settlements. It might be thought more in accordance with the reason and principle on which that consideration is founded that it should support that contract alone which was in the minds of the parties at the time * of the marriage, and on the faith [* 479] of which the marriage might be said to have been contracted (*w*); and, subject to any question as to undue influence (*x*), to treat any such previous inconsistent dispositions as unaided by the marriage consideration.

Trust for maintenance.

As a voluntary settlement is not supported by a contract, so a settlor of a voluntary post-nuptial settlement which contained a discretionary trust for the maintenance of the children out of the income of the fund settled is not entitled to recoup himself out of the accumulations of that income any sums he may have paid for their maintenance (*y*).

(*v*) *Thomas* v. *Brennan*, 15 L. J. (N.S.) Ch. 420; *M'Donnell* v. *Hesilrige*, 16 Beav. 346; *Bond* v. *Walford*, 32 Ch. D. 238.
(*w*) *Bond* v. *Walford*, 32 Ch. D. 238.
(*x*) *Robinson* v. *Dickenson*, 3 Russ. 399.
(*y*) *In re Kerrison's Trusts*, L. R. 1 Eq. 422.

*CHAPTER V.

GIFTS VOIDABLE BETWEEN THE PARTIES FOR FRAUD, UNDUE INFLUENCE ETC., PRACTISED ON THE DONOR.

Fraud between parties.

THE rule that a man cannot allege fraud to avoid his own deed, of course has no application where the fraud was practiced *against himself;* fraud between the parties will always make the voluntary deed void as between them, and the fact of a conveyance being made without consideration is frequently a mark of such fraud.

Consequently when a voluntary deed has been obtained by fraud or undue influence (*z*), under circumstances from which it appears that the donor did not know the effect of the deed, and did not make it with his eys open (*a*), the Court will set it aside or restrain proceedings upon it at law (*b*).

Deed not properly understood.

If a man executes a deed without being aware of the effect of it, that deed cannot be set up against him either at law (*c*) or in equity (*d*). Where there are circumstances which would lead the Court to suppose that the donor was not fully aware of what he was doing, the Court will not do anything in support of the gift (although no case of ignorance on the part of the donor is made out by the other side) unless satisfied that the effect of what he was doing was fully explained to the

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(*z*) See further as to this subject, the notes to *Huguenin* v. *Baseley*, 14 Ves. 273, 2 Wh. & Tu. L. C. 6th ed. 597 et seq.; Kerr, Fraud & Mis. 2d ed. 122 et seq.; Peachey, Sett. 584; 2 Spence, Eq. J. 299; Pollock, Cont. 4th ed. 556 et seq. As to Wills, see 1 Jarm. 4th ed. 35, 36; *Hall* v. *Hall*, L. R. 1 P. & M. 481; *Parfitt* v. *Lawless*, L. R. 2 P. & M. 462; *Longford* v. *Purdon*, 1 L. R. Ir. 75; *Wingrove* v. *Wingrove*, 11 P. D. 81.

(*a*) See note (*z*), and *Wollaston* v. *Tribe*, L. R. 9 Eq. 44; *Dutton* v. *Thompson*, 23 Ch. D. 278; *National Provincial Bank of England* v. *Jackson*, 33 Ch. D. 1, post.

(*b*) *Lloyd* v. *Clark*, 6 Beav. 309.

(*c*) *Doe* v. *Bennet*, 8 C. & P. 124.

(*d*) *Ramsden* v. *Hylton*, 2 Ves. 304; *Huguenin* v. *Baseley*, 14 Ves. 273, 296; *Hoghton* v. *Hoghton*, 15 Beav. 278; *Wollaston* v. *Tribe*, L. R. 9 eq. 44; *Lister* v. *Hodgson*, L. R. 4 Eq. 30; *Everitt* v. *Everitt*, L. R. 10 Eq. 405; *Dutton* v. *Thompson*, 23 Ch. D. 278; *Phillips* v. *Mullings*, L. R. 7 Ch. 243; and see *In re Garnett*, 31 Ch. D. 1.

donor (*e*). Where, for *example, a man who [* 481] could not write executed a document, drawn out, read over to him, and attested by an unprofessional person, and purporting to grant all his property to his wife, the Court, independently of the validity of the gift per se, declined to support it (*f*).

A gift not properly understood by the grantor cannot be upheld, though there was no *actual* fraud (*g*), and may be set aside even after the death of donor and donee (*h*).

Voluntary settlement not rectified *against* settlor.

The Court cannot reform or rectify a voluntary settlement *against* the settlor. He, and he alone, can choose on what terms or subject to what conditions to make his gift; and the Court cannot compel him to alter his own deliberate act, however capricious or inadvisable it may be (*i*).

If the deed does not express the intention of the settlor, and he contests it, the deed must stand or fall in its actual condition without alteration (*k*). So, unless the settlor consents, the voluntary settlement must be upheld or set aside *in toto;* it cannot be modified to suit former intentions (*l*).

Voluntary settlement when rectified.

A voluntary settlement may, however, be rectified or reformed in certain cases upon the ground of mistake, either by the insertion (*m*), or alteration (*n*), or omission (*o*) of powers.

(*e*) *Price* v. *Price*, 14 Beav. 598 S. C. 1 De G. M. & G. 308; *Grosvenor* v. *Sherratt*, 28 Beav. 659, and see post.

(*f*) *Price* v. *Price*, 14 Beav. 598, S. C. 1 De G. M. & G. 308, post, p. 492; *Grosvenor* v. *Sherratt*, 28 Beav. 659.

(*g*) *Evans* v. *Llewellyn*, 3 Bro. C. C. 150; *Sturge* v. *Sturge*, 12 Beav. 229; *Phillips* v. *Mullings*, L. R. 7 Ch. 243; *Dutton* v. *Thompson*, 23 Ch. D. 278; and see *Mara* v. *Ray*, W. N. (1872) 127; *National Provincial Bank of England* v. *Jackson*, 33 Ch. D. 1.

(*h*) *Phillipson* v. *Kerry*, 32 Beav. 628, S. C. 638.

(*i*) *Brown* v. *Kennedy*, 33 Beav. 133, 147, S. C. 154; *Phillipson* v. *Kerry*, 33 Beav. 628, S. C. 638; *Lister* v. *Hodgson*, L. R. 4 Eq. 30, 34; *Turner* v. *Collins*, L. R. 7 Ch. 329; *Keogh* v. *M'Grath*, 5 L. R. Ir. 478; see Kerr, Fraud & Mis. 2nd ed. 507.

(*k*) *Broun* v. *Kennedy*, 33 Beav. 147; *Keogh* v. *M'Grath*, 5 L. R. Ir. 478, 502; and see *Hughes* v. *Seanor*, 18 W. R. 1122.

(*l*) *Cooke* v. *Lamotte*, 15 Beav. 232, 250; *Phillipson* v. *Kerry*, 33 Beav. 628, S. C. 638; *Turner* v. *Collins*, L. R. 7 Ch. 342.

(*m*) *Hanley* v. *Pearson*, 13 Ch. D. 545; *Welman* v. *Welman*, 15 Ch. D. 570; *James* v. *Couchman*, 29 Ch. D. 212.

(*n*) *Keogh* v. *M'Grath*, 5 L. R. Ir. 478.

(*o*) *Lackersteen* v. *Lackersteen*, 5 Jur. (N.S.) 1111; *In re De La Touche's Settlement*, L. R. 10 Eq. 599; *Turner* v. *Collins*, L. R. 7 Ch. 329; *Hanley* v. *Pearson*, 13 Ch. D. 545.

Of course where the settlor agrees that part of a voluntary settlement ought to stand, the Court has power as against him to rectify or reform such settlement (*p*).

[*482] *If a man executes a voluntary deed and thereby declares trusts, *after* his death it is competent for a volunteer under that trust, if he can prove, by instructions or otherwise, that any of the trusts have been declared erroneously, contrary to the intention of the settlor, to file a bill to have those trusts reformed (*q*), even if the error be such as to carry the property back to the estate of the original settlor (*r*).

But where a power of revocation is omitted in a voluntary settlement under the notion that it is not necessary to insert it, the settlement cannot be rectified by inserting the power (*s*).

Mistake must be common to *all* the parties.

In order to enable the Court to rectify or reform a voluntary settlement on the ground of mistake, it must be proved that *such mistake was common to all the parties* to the voluntary settlement; it must be shewn that they all made the blunder, and the blunder must be clearly proved (*t*). The reason of this is that as the Court virtually makes a new written agreement for all the parties, it can only act upon their mutual and concurrent intention (*u*).

The Court will reform or rectify a voluntary settlement upon the uncontradicted evidence of the plaintiff alone (*v*), and that evidence may be given by parol if it be proved that written evidence cannot be obtained (*w*). The proper proceeding is by action (*x*) in the Chancery Division of the High Court of Justice, unless the fund the subject of the settlement has been paid into court under the Trustee Relief Acts (*y*). The action cannot be heard as a short cause (*z*). The order

(*p*) *Turner* v. *Collins*, L. R. 7 Ch. 329, 342.
(*q*) *Lister* v. *Hodgson*, L. R. 4 Eq. 34.
(*r*) *Thompson* v. *Whitmore*, 1 J. & H. 268, 273.
(*s*) *Worrall* v. *Jacob*, 3 Mer. 270.
(*t*) *Rooke* v. *Lord Kensington*, 2 K. & J. 253; *Bentley* v. *Mackay*, 31 Beav. 151, S. C. 4 D. F. & J. 279.
(*u*) *Fowler* v. *Fowler*, 4 De G. & J. 250, 265.
(*v*) *Hanley* v. *Pearson*, 13 Ch. D. 545.
(*w*) *Lackersteen* v. *Lackersteen*, 6 Jur. (N.S.) 1111.
(*x*) Jud. Act, 1873, s. 34; and see R. S. C. Ord. 55, r. 2 (5).
(*y*) *Re Malet*, 30 Beav. 407; *In re Bird's Trusts*, 3 Ch. D. 214.
(*z*) *Clennell* v. *Clennell*, W. N. (1884) 14.

of the Court to rectify the deed is enough to pass the legal estate without a conveyance (*z*), and in other cases the deed is usually rectified by indorsing a copy of the order on it (*a*).

*It is with the object of protecting from fraud of this kind (*b*) persons who are less able themselves to cope with it, that infants, insane persons (*c*), or persons of weak intellect, are to a great extent incapacitated from binding themselves by their contracts, and that contracts made under duress are voidable by the person whose free will was restrained (*d*). [*483] Incapacity of persons not sui juris.

So before the Married Women's Property Act, 1882, a married woman could only bind her separate property in equity in certain special cases, and the common law did not allow her to contract at all (*e*).

Where at the time that a gift or voluntary settlement is made a confidential or fiduciary relation existed between the donor and donee, the view the Court adopts is that the donee had great temptation to take advantage of his position for the purposes of fraud, and unusual opportunities of practising upon the weakness or the ignorance of the donor. It is therefore a rule of equity that all gifts or voluntary settlements made under such circumstances are to be viewed with a greater or less amount of suspicion in proportion to the means which the relation of the parties to each other afforded of exercising terrorism or undue influence, or inducing the donor to make the gift or voluntary settlement without being fully aware of and intending what he was doing (*f*). Confidential relations.

(*z*) *White* v. *White*, L. R. 15 Eq. 247; *Hanley* v. *Pearson*, 13 Ch. D. 545; and see Seton, 4th ed. 1343.

(*a*) *Hanley* v. *Pearson*, 13 Ch. D. 549; *James* v. *Couchman*, 29 Ch. D. 218; and see Seton, 4th ed. 1343.

(*b*) Ante, pp. 480, 481.

(*c*) As to degrees of incapacity of mind, see *White* v. *Small*, 2 Ch. Ca. 103; Lord Thurlow's judgment in *Welles* v. *Middleton*, 1 Cox, 119; *Selby* v. *Jackson*, 6 Beav. 192, in which, under the circumstances, the Court refused to set aside deeds by a person under restraint in a lunatic asylum, under the medical certificate; and *In re Gordon*, L. R. 10 Ch. 192.

(*d*) 2 Bl. Com. 29 et seq.; 2 Broom. & H. Com. 468; Kerr, Fraud & Mis. 2nd ed. 120 et seq.

(*e*) 45 & 46 Vict. c. 75, s. 1 (2), (3), (4), *Conolan* v. *Leyland*, 27 Ch. D. 632, *In re Shakespeare*, 30 Ch. D. 169; ante, pp. 281, 282.

(*f*) See the cases cited and commented on under *Huguenin* v. *Baseley*, in 2 Wh. & Tu. L. C. 6th ed. 597 et seq.; Kerr, Fraud & Mis. 2nd ed. 120 et seq.; and see *Nantes* v. *Corrock*, 9 Ves. 182, a

Husband and wife.

The common law, for instance, having regard to the great influence which a husband has it in his power to exert over his wife, allowed no contracts between husband and wife to be binding (*g*). For the same reason [* 484] a married woman could not in *general validly deal with any interest in land belonging to her (*h*) without being subjected to certain safeguards against the undue influence of her husband—viz., that the judge, master, or commissioners "shall examine her apart from her husband touching her knowledge of such deed, and shall ascertain whether she freely and voluntary consents to such deed, and unless she freely and voluntary consents to such deed shall not permit her to acknowledge the same" (*i*).

Guardian.

Father.

Doctor.

Solicitor.

Again, a ward is, or is supposed to be, very much under the power of his or her guardian (*k*), and a child is assumed to be greatly under the influence of his father (*l*). So a patient is regarded as very much under the influence of his doctor (*m*). A client or principal seldom knows so much of his own affairs as his solicitor or agent does, and is therefore peculiarly open to unfair dealing on the solicitor's part (*n*).

In the case, therefore, of a gift or voluntary settlement made by one of such persons to, or for the benefit of, the other, the one is supposed to be under the influence of the other; and it must be shewn that sufficient protection has been interposed against the exertion of such influence.

Burden of proof when cast on donee.

In considering the question what *undue influence* will avail to render voidable a gift or voluntary settlement

case of master and servant; *Rhodes* v. *Bate*, L. R. 1 Ch. 252; *Lyon* v. *Home*, L. R. 6 Eq. 655; *Phillipson* v. *Kerry*, 32 Beav. 628; *Broun* v. *Kennedy*, 33 Beav. 133; *Graham* v. *Johnson*, L. R. 8 Eq. 36; *Mitchell* v. *Homfray*, 8 Q. B. D. 587; post, pp. 484 et seq.

(*g*) See 1 Bright, Husb. & Wife, 29; *Price* v. *Price*, 14 Beav. 598; but see now 45 & 46 Vict. c. 75, ss. 1 (2), 10; ante, pp. 281 et seq.

(*h*) 3 & 4 Will. 4, c. 74, ss. 77, 78.

(*i*) 3 & 4 Will. 4, c. 74, s. 80.

(*k*) See *Hylton* v. *Hylton*, 2 Ves. 547–8; *Hatch* v. *Hatch*, 9 Ves. 292, 296; *Espey* v. *Lake*, 10 Hare, 260; *Taylor* v. *Johnston*, 19 Ch. D. 603; post, pp. 493, 494.

(*l*) *Kempson* v. *Ashbee*, L. R. 10 Ch. 15; *Bainbrigge* v. *Browne*, 18 Ch. D. 188; post, pp. 488 et seq.

(*m*) *Mitchell* v. *Homfray*, 8 Q. B. D. 587.

(*n*) See Kerr, Fraud & Mis. 2nd ed. 140 et seq; *Morgan* v. *Minet*, 6 Ch. D. 638; post, p. 493. As to what constitutes the relation of solicitor and client, see *Goddard* v. *Carlisle*, 9 Price, 169.

by a donor so obtained from him, the following important distinction must be carefully borne in mind:—

If the person or persons who has or have obtained the gift or voluntary settlement stood in a confidential or fiduciary relation to the donor at the time the gift or voluntary settlement was made, such undue influence will be *presumed;* and, if not rebutted, the gift or voluntary settlement will be avoided.

The burden of proving that the transaction was a righteous one, *was fairly conducted as if be- [* 485] tween strangers, in such a case is cast upon the donee. To enable the donee to retain the gift or to uphold the voluntary settlement, he must prove clearly and conclusively that it was made by the donor with full knowledge of what he was doing, and with the free intention of giving the donee the benefit which he conferred upon him by that gift or voluntary settlement (*o*). The donee must prove affirmatively that the gift or voluntary settlement was made by a person in such a position as would enable him to form an absolutely free and unfettered judgment (*p*).

If, however, the person or persons who has or have obtained that gift or voluntary settlement did not stand, at the time that gift or voluntary settlement was made, in a confidential or fiduciary position to the donor, then undue influence is *not* presumed.

Burden of proof whether cast on donee, to shew donor understood nature of his act?

It is a doubtful point whether, in a case in which no confidential or fiduciary relation exists between the donor and the donee, the burden of proof lies on the donee to shew that the donor perfectly understood the nature of his act. This has been laid down as the law by Lord Romilly, M.R., in *Cooke* v. *Lamotte* (*q*) and *Hoghton* v. *Hoghton* (*r*), and there is a dictum of Lord Hatherley, L.C., in *Phillips* v. *Mullings* (*s*) to the same effect; but it must be observed that these judgments

(*o*) *Hunter* v. *Atkins*, 3 My. & K. 113; *Smith* v. *Kay*, 7 H. L. C. 750; *Parfitt* v. *Lawless*, L. R. 2 P. & D. 468, per Lord Penzance; *Bainbrigge* v. *Browne*, 18 Ch. D. 188; *Taylor* v. *Johnston*, 19 Ch. D. 603.

(*p*) *Archer* v. *Hudson*, 6 H. L. C. 49; *Parfitt* v. *Lawless*, L. R. 2 P. & D. 469.

(*q*) 15 Beav. 234.

(*r*) 15 Beav. 299; and see *Price* v. *Price*, 1 De G. M. & G. 308.

(*s*) L. R. 7 Ch. 246.

and this dictum are wider in their scope than was necessary for the decisions in the cases (*t*).

Burden of proof cast on donor if confidential relation does *not* exist.

But whether in every case the burden of proof lies in the first instance on the donee to establish the fact that the donor perfectly understood the nature of his act or not, it is quite certain that if no confidential or fiduciary relation exists between the parties, and if the donee establishes this fact, then the burden of proof is shifted to the donor.

The donor must then prove affirmatively the existence [*486] of fraud, *undue influence, or surprise at the time he made the gift or voluntary settlement in order to avoid it ; and unless and until this is proved the gift or voluntary settlement will be supported (*u*).

Ground of distinction.

The ground of this fundamental distinction between positions which, in relation to the donor, are confidential or fiduciary, and those which are not, is this. The natural influence which such a relation involves exerted by those who possess it to obtain a benefit for themselves is, in the view of the Court, of itself an *undue* influence (*v*). If, therefore, the relation is deemed by the Court a confidential or fiduciary one, it will be assumed that the person who fills that position has exerted the natural influence that position gave him—that is to say, has employed *undue* influence ; and, therefore, the Court casts on him the *onus* of shewing at least that the influence was not then operative (*w*).

The general principle upon which the Court acts in such cases has been frequently stated ; and the Court has always been careful to refrain from any attempt to limit its jurisdiction by giving any precise list of possible instances in which relief may be granted.

Hunter v. *Atkins*.

So Lord Brougham, L.C., in his judgment in *Hunter* v. *Atkins* (*x*), said : "For I take the rule to be this :

(*t*) See *Villers* v. *Beaumont*, 1 Vern. 100 ; *Hunter* v. *Atkins*, 3 My. & K. 113, 136 ; *Beanland* v. *Bradley*, 2 Sm. & G. 339 ; *Kirwan* v. *Cullen*, 4 Ir. Ch. Rep. 322, 328 ; *Armstrong* v. *Armstrong*, Ir. R. 8 Eq. 1 ; *Henry* v. *Armstrong*, 18 Ch. D. 668 ; and see Poll. Cont. 4th ed. 561–562 ; Story, Eq. Jur. 12th ed. ss. 308–322.

(*u*) *Parfitt* v. *Lawless*, L. R. 2 P. & D. 462, 469.

(*v*) *Parfitt* v. *Lawless*, L. R. 2 P. & D., per Lord Penzance, 469; *Taylor* v. *Johnston*, 19 Ch. D. 608, per Bacon, V.C. ; and see *Turner* v. *Collins*, L. R. 7 Ch., per Lord Hatherley, L.C., 339.

(*w*) *Parfitt* v. *Lawless*, L. R. 2 P. & D. 469, 470 ; *Taylor* v. *Johnston*, 19 Ch. D. 608.

(*x*) 3 My. & K. 135.

there are certain relations known to the law as attorney, guardian, trustee. If a person standing in these relations to client, ward, or cestui que trust takes a gift or makes a bargain, the proof lies upon him that he has dealt with the other party, the client, ward, &c., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short the rule, rightly considered, is that the person standing in such relation must, before he can take a gift, or even enter into a transaction, place himself in exactly the same position as a stranger would have been in, so that he may gain no advantage whatever from his relation to the other party, beyond what may be the natural and unavoidable consequence of kindness arising out of that relation . . .

* "The rule, I think, cannot be laid down [* 487] much more precisely than I have stated it; that where the known and defined relation of attorney and client, guardian and ward, trustee and cestui que trust, exists, the conduct of the party benefited must be such as to sever the connection, and to place him in the same circumstances in which a mere stranger would have stood, giving him no advantage, save only whatever kindness or favour may have arisen out of the connection; and that where the only relation between the parties is that of friendly habits or habitual reliance on advice and assistance, accompanied with partial employment in doing some sort of business, care must be taken that no undue advantage shall be made of the influence thus acquired. The limits of natural and often unavoidable kindness, with its effects, and of undue influence exercised or undue advantage taken, cannot be more rigorously defined; nor is it perhaps, advisable that any strict rule should be laid down—any precise line drawn."

So it was laid down by Lord Cottenham, L.C. in *Dent* v. *Bennett* (*y*), that the relief stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over

(*y*) 4 My. & Cr. 276; per Sir S. Romilly in his celebrated reply in *Huguenin* v. *Baseley*, 14 Ves. 285, 286; *Gibson* v. *Russell*, 2 Y. & C. C. C. 104; *Fowler* v. *Wyatt*, 24 Beav. 232, 237; *Cooke* v. *Lamotte*, 15 Beav. 234, 240; *Billage* v. *Southee*, 9 Hare, 534, 540; *Rhodes* v. *Bate*, L. R. 1 Ch. 222, 258; *Mitchell* v. *Homfray*, 8 Q. B. D. 587.

another. Any enumeration of the descriptions of persons against whom the beneficial jurisdiction of the Court ought to be most freely exercised would merely narrow or fetter its scope.

So Lord Kingsdown said: "The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed" (*z*).

Tate v. *Williamson.*

So Lord Chelmsford, L.C., in *Tate* v. *Williamson* (*a*), stated the principle in the following general terms: "Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain [* 488] an * advantage of the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.

Harfitt v. *Lawless.*

And in *Parfitt* v. *Lawless* (*b*), Lord Penzance pointed out that "in equity persons standing in certain relations to one another—such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward—are subject to certain presumptions when transactions between them are brought in question; and if a gift or contract made in favour of him who holds the position of influence is impeached by him who is subject to that influence, the Courts of equity cast upon the former the burden of proving that the transaction was fairly conducted as if between strangers; that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence."

Gift or voluntary settlement voidable if to person in confidential position to donor.

The general principle that gifts made to, or voluntary settlements made in favour of, a person who stands in a confidential or fiduciary relation to the donor are voidable at that donor's option, unless the donee can prove the transaction to have been conducted as if between two strangers, has been illustrated by frequent decisions.

(*z*) *Smith* v. *Kay*, 7 H. L. C. 777.
(*a*) L. R. 2 Ch. 61.
(*b*) L. R. 2 P. & D. 468; Brett, J., and Baron Pigott concurred.

A gift or voluntary settlement made by a child to or in favour of his father very soon after that child has come of age is always jealously regarded by the Court.

Gift or voluntary settlement from child to father.

As was laid down by Lord Romilly, M.R., in *Hoghton* v. *Hoghton* (*c*), and quoted with approval by Lord Hatherley, L.C., in *Turner* v. *Collins* (*d*), "two things are required to be proved by a parent setting up a deed in such a case: first, that the deed was the real and actual deed of the child, and was intended by the child to have the operation which it has; and, secondly, that that intention was fairly produced."

Now, the relation of father and child is such that influence is *assumed as between them. It is [*489] *not* assumed that such influence is unduly exercised; but it does lie on the father, if he takes any benefit under a gift or voluntary settlement, to prove the righteousness of the transaction; and if he fails to do so, that gift or settlement will be set aside (*e*).

Turner v. *Collins.*

In *Turner* v. *Collins* (*f*), a son under twenty-two years of age, and then considerably in debt, without any independent advice, executed a deed by which he gave to his father's second wife and her daughter successive estates for life in two reversionary interests to which he was entitled, and also gave his father a power of appointment, in the event of his marrying a third wife, over that one of these two reversionary interests which he derived from his mother's father. It was proved that the transaction was pressed on by his father, though the son understood what was going on. Lord Hatherley, L.C., held that, if proceedings had been taken in time, this deed could not have been supported against the son.

Kempson v. *Ashbee.*

In *Kempson* v. *Ashbee* (*g*) a young lady scarcely

(*c*) 15 Beav. 278. (*d*) L. R. 7 Ch. 338.

(*e*) So gifts were set aside in *Carpenter* v. *Heriot*, 1 Ed. 338; *Hawes* v. *Wyatt*, 3 Bro. C. C. 156; *Heron* v. *Heron*, 2 Atk. 160; *Young* v. *Peachy*, 2 Atk. 254; *Herne* v. *Herne*, Barnard. Ch. 430; *Cocking* v. *Pratt*, 1 Ves. 401; *Baker* v. *Bradley*, 7 De G. M. & G. 597; *Hoghton* v. *Hoghton*, 15 Beav. 278; *Bury* v. *Oppenheim*, 26 Beav. 594; *Davies* v. *Davies*, 4 Giff. 417; *Chambers* v. *Crabbe*, 34 Beav. 457; *Berdoe* v. *Dawson*, 34 Beav. 603; *Bainbrigge* v. *Browne*, 18 Ch. D. 188; and see Eversley, Dom. Rel. 578 et seq.; Story, Eq. Jur. 12th ed. s. 309; Pollock, Cont. 4th ed. 5; Kerr, Fraud & Mis. 2nd ed. 155.

(*f*) L. R. 7 Ch. 329.

(*g*) L. R. 10 Ch. 15.

over twenty-one years of age joined her stepfather in executing a bond as surety for the repayment by him of £600 payable at the end of six years, but she received no consideration for this. She was at the time living in her stepfather's house, and had no independent advice; she had an income of only £195, and executed the bond at the request of her stepfather. It was held by the Court of Appeal that, if she had taken proceedings within a reasonable time, the bond could have been set aside.

Gift or voluntary settlement by child to father soon after coming of age.

So if a gift or voluntary settlement is made by a child to or in favour of his father, soon after coming of age, while such child is not entirely emancipated from [* 490] the father's control, although * there may be no *direct* evidence of any undue pressure by the father, yet the Court will *infer* pressure and undue influence from such a state of circumstances, and that gift or voluntary settlement may be set aside, at least as against the father, if impeached by the child within a reasonable time. To support such a deed the father must shew the child executed the deed of gift or voluntary settlement after having had independent advice, with a full knowledge of its contents, and a free intention of giving to the father the benefit the deed or voluntary settlement conferred upon him (*h*).

Bainbrigge v. *Browne.*

Thus in *Bainbrigge* v. *Browne* (*i*), where a daughter aged twenty-five, usually living in her father's house, but at the time she executed the deed staying with her aunt, and two sons of the respective ages of twenty-four and twenty-two years, students at universities, who executed the deed when at home in the presence of their father and mother, by deed charged their reversionary interests under the marriage settlement of their parents with payment of certain moneys due by the father, such deed was held void as against him.

Gift or voluntary settlement by child to person *in loco parentis.*

The same principles apply to the case of a person who has received a gift from a child to whom he has placed himself *in loco parentis.*

In *Archer* v. *Hudson* (*k*) a niece, two months after

(*h*) *Bainbrigge* v. *Browne*, 18 Ch. D. 188.

(*i*) 18 Ch. D. 188.

(*k*) 7 Beav. 551, S. C. 564; *Osmond* v. *Fitzroy*, 3 P. Wms. 129; *Dawson* v. *Massey*, 1 Ball & B. 233; *Beasley* v. *Magrath*, 2 Sch. & L. 31; *Dettmarr* v. *Metropolitan and Provincial Bank*, 1 H. & M. 641; *Espey* v. *Lake*, 10 Hare, 260. See Eversley, Dom. Rel. 581.

she came of age, and after she had entered into possession of her property, joined as surety for her uncle in signing a promissory note for £500 to secure a debt due from him. She had been brought up by him, and at the time she signed the note was living in his house. Lord Langdale, M.R., held that the uncle stood *in loco parentis* to her, and set aside the security as obtained by his undue influence. *Archer* v. *Hudson.*

When gift or voluntary settlement by child on father is upheld.

But although in such a case the influence of the father over the child is assumed, yet if only a proper influence is exercised, *for the benefit of the [* 491] child, and not for the advantage of the father, the gift or voluntary settlement will be upheld (*l*). So Turner, L.J., said in *Wright* v. *Vanderplank* (*m*): "The law on the subject is well settled. A child may make a gift to a parent, and such a gift is good if it is not tainted by a parental influence. When the parental influence is disproved, or that influence has ceased, a gift from a child stands on the same footing as any other gift."

Same principle applies to gift or voluntary settlement by child to mother.

It is conceived that the principle upon which these cases have been decided would apply equally to a gift or voluntary settlement made by a child under similar circumstances to or in favour of his mother (*n*).

Family resettlements upheld.

This class of cases must, hower, be carefully distinguished from those in which the transaction really is in the nature of a family arrangement, being a resettlement of property between father and son. The Court always looks with favour on such resettlements, and disregards the parental influence in reference to them where there is no other consideration or element in the case, and, if the resettlement is reasonable and for the benefit of the family, will uphold it, even if the father takes some benefit (*o*).

Gift or voluntary settlement by parent to child as valid as by one stranger to another.

Of course this equitable doctrine of parental influence has no application to the case of a gift *by* a parent to a child or a voluntary settlement made *by* a

(*l*) *Blackborn* v. *Edgeley*, 1 P. Wms. 606; *Kinchant* v. *Kinchant*, 1 Bro. C. C. 369, 374; *Tendril* v. *Smith*, 2 Atk. 86; *Jenner* v. *Jenner*, 2 D. F. & J. 359, 375; and see *Blunden* v. *Barker*, 1 P. Wms. 639–640; *King* v. *King*, 3 Jur. (N.S.) 609.

(*m*) 8 De G. M. & G. 146; and see *Mitchell* v. *Homfray*, 8 Q. B. D. 592, per Lord Selborne, L.C.

(*n*) See Eversley, Dom. Rel. 578.

(*o*) *Hoghton* v. *Hoghton*, 15 Beav. 278; *Hartopp* v. *Hartopp*, 21 Beav. 259; *Baker* v. *Bradley*, 7 De G. M. & G., per Turner, L. J., 620 *Fane* v. *Fane*, L. R. 20 Eq. 698; ante pp. 265 et seq.

parent in favor of a child. Such gift or settlement is as valid as if it had been from one stranger to another (*p*).

Gift or voluntary settlement by wife to husband.

The Court has always regarded with jealousy any transaction in the nature of a gift or voluntary settlement made by the wife to or in favour of her husband [* 492] (*q*); and such gift or settlement * will be set aside on proof that the husband has exerted any improper influence over his wife to induce her to make it.

So a promissory note obtained from a wife, by the undue influence of her husband, as a security for his debt, cannot be enforced by a creditor of his who takes it with notice of that influence (*r*).

So it was held that a gift by an illiterate man to his wife of all his property for her separate use could not be enforced by her, because he was not proved to have well understood what he was doing (*s*).

Such cases have been of somewhat rare occurrence. but as by virtue of the Married Women's Property Act, 1882, a married woman has a separate legal existence as to property acquired by her since December 31, 1882 (*t*), they may now more frequently occur.

It seems probable that the Court would now hold the burden of proof to lay on the husband or person who supports such gift or voluntary settlement (*u*); and not, as formerly was the case, on the wife or the person who sought to impeach it (*v*).

The same principle has been applied to a gift or voluntary settlement made by a woman to or in favour of the man to whom she was engaged to be married (*w*)

(*p*) *Beanland* v. *Bradley*, 2 Sm. & G. 339; *May* v. *May*, 31 Beav. 81, 87; Pollock, Cont. 4th ed. 569.

(*q*) See the remarks of Lord Hardwicke, L. C., in *Grigsby* v. *Cox*, 1 Ves. 217; *Atkins* v. *Essex*, 14 Ves. 542; *Field* v. *Sowle*, 4 Russ. 112; ante, p. 488.

(*r*) *Sanguinetti* v. *Messiter*, L. T. Dec. 12, 1885, p. 93.

(*s*) *Price* v. *Price*, 1 De G. M. & G 308.

(*t*) 45 & 46 Vict. c. 75, ss. 2, 5, 25.

(*u*) *Corbett* v. *Brock*, 20 Beav. 530, S. C. 531; *Coulson* v. *Alison*, 2 D. F. & J. 524; *Parfitt* v. *Lawless*, L. R. 2 P. & D. 468; ante, pp. 484, 485.

(*v*) See *Grigsby* v. *Cox*, 1 Ves. 217; *Nedly* v. *Nedly*, 5 D. G. & Sm. 377.

(*w*) *Page* v. *Horne*, 11 Beav. 227, 235–6; *Corbett* v. *Brock*, 20 Beav. 524, S. C. 531; *James* v. *Holmes*, 31 L. J. (N. S.) Ch. 567.

or by a woman whose marriage was void in favor of her supposed husband (*x*).

Gift or voluntary settlement from cestui que trust to trustee.

A gift or voluntary settlement made by a cestui que trust to or in favour of his trustee, while that relation exists, is voidable at the option of the cestui que trust, until he has deliberately and with full knowledge elected to abide by it. This is only another special case of the general principle as to gifts or voluntary settlements made to or in favour of persons who, at the time of * such gift or voluntary settlement, occupy [* 493] a *confidential* or *fiduciary* position to the donor (*y*).

Gift or voluntary settlement by client to solicitor, invalid while relation exists.

With regard to gifts made to, or voluntary settlements made in favour of, solicitors by their clients the Court has always taken a very strict view. So long as the relation of solicitor and client subsists, the solicitor cannot by way of gift take a benefit from his client (*z*). This rule of law has been held to be necessary for the safety of society, and to guard the client against what Lord Thurlow termed "the crushing influence of the solicitor" (*a*). To set aside a gift or voluntary settlement made by a client to or in favour of his solicitor it is *enough* to shew that at the time that gift or voluntary settlement was made the confidential or fiduciary relation of solicitor and client existed (*b*). So soon as this fact is proved, the rule of the Court is that such gift or voluntary settlement is absolutely invalid; it is not open to the solicitor to rebut the presumption of undue influence and to shew the transaction to be a fair one.

When gift or voluntary settlement by client to solicitor is valid.

Such gift or voluntary settlement, however, will be upheld if at the time it is made the relation between the parties of solicitor and client is severed, so that

(*x*) *Coulson* v. *Alison*, 2 D. F. & J. 521.

(*y*) *Hatch* v. *Hatch*, 9 Ves 192; *Hunter* v. *Atkins*, 3 My. & K. 113; *Barrett* v. *Hartley*, L. R. 2 Eq. 789; *Ellis* v. *Barker*, L. R. 7 Ch. 104; *King* v. *Anderson*, I. R. 8 Eq. 625, ante, p. 486.

(*z*) *Tomson* v. *Judge*, 3 Drew., per Kindersley, V.C., 314–316, and cases there cited; *Hunter* v. *Atkins*, 3 My. & K. 113; *Baker* v. *Loader*, L. R. 16 Eq. 49; *Morgan* v. *Minet*, 6 Ch. D. 638; notes to *Huguenin* v. *Baseley*, 2 Wh. & Tu. L. C. 6th ed. 628, et seq.; Kerr, Fraud & Mis. 2nd ed. 145; Story, Eq. Jur. 12th ed. ss. 310–313; Pollock, Cont. 4th ed. 596, but see *Re Holmes' Estate*, 3 Giff. 345, 346; commented on in *Mitchell* v. *Homfray*, 8 Q. B. D. 592; *Parfitt* v. *Lawless*, L. R. 2 P. & D. 468.

(*a*) *Welles* v. *Middleton*, 1 Cox, 112.

(*b*) *Tomson* v. *Judge*, 3 Drew. 315, 316; *Morgan* v. *Minet*, 6 Ch. D. 646.

they stand as strangers to one another. The severance of the relation destroys the possibility of suspicion that influence was in any degree exerted by the solicitor in that character to effect the transaction (*c*). It does not appear to be essential to the validity of such a gift or voluntary settlement that the relation should be forever severed, but merely that the relation should be completely severed so far at least as relates to that particular matter.

Gift or voluntary settlement from ward to guardian.

This principle is applied very strictly in the case of [* 494] a gift to, or * voluntary settlement made in favour of, a guardian by his ward very soon after that ward has attained the age of twenty-one years (*d*); and the principle has been extended even to cases in which the ward had attained his majority many years before the impeached gift or voluntary settlement was made (*e*). The Court has always regarded such gifts or voluntary settlements so made by a ward with great jealousy, and has based the principle as well on its public utility, as a debt of humanity that one man owes to another, as upon the undue advantage of the ward which it presumes is taken by the guardian in his *fiduciary* position (*f*):

If, however, the relation of guardian and ward has determined, and the accounts have been fully and fairly settled, a reasonable gift by the ward to the guardian is valid (*g*)

And where the existence of the relation of guardian and ward was not proved, and no influence was exerted by the donee, a gift by an infant aged twenty, a few

(*c*) *Tomson* v. *Judge*, 3 Drew. 316; *Morgan* v. *Minet*, 6 Ch. D. 647, 648.

(*d*) *Pierce* v. *Waring*, 1 P. Wms. 120; *Hylton* v. *Hylton*, 2 Ves. 547; and see *Dawson* v. *Massey*, 1 Ball & B. 219; *Aylward* v. *Kearney*, 2 Ball & B. 463; *Cray* v. *Mansfield*, 1 Ves. 379; *Thomber* v. *Sheard*, 12 Beav. 589; *Maitland* v. *Irving*, 15 Sim. 437; *Maitland* v. *Backhouse*, 16 Sim. 58; *Rhodes* v. *Bate*, L. R. 1 Ch. 252: *Everitt* v. *Everitt*, L. R. 10 Eq. 405; *Taylor* v. *Johnston*, 19 Ch. D. 603; Eversley, Dom. Rel. 777 et seq.; Pollock, Cont., 4th ed. 569 et seq.; Kerr, Fraud & Mis. 2nd ed, 153; Simpson, Infants, 431 et seq.; Story, Eq. Jur. 13th ed. ss. 317 et seq.

(*e*) *Hatch* v. *Hatch*, 9 Ves. 292; *Wood* v. *Downes*, 18 Ves. 127, per Lord Eldon; Eversley, Dom. Rel. 782.

(*f*) *Hylton* v. *Hylton*, 2 Ves. 548, 549.

(*g*) *Hylton* v. *Hylton*, 2 Ves. 549; *Hatch* v. *Hatch*, 9 Ves. 296; *Taylor* v. *Johnston*, 19 Ch. D. 608, 609; and see *The Duke of Hamilton* v. *Lord Mohun*, 1 P. Wms. 118; *Pierce* v. *Waring*, 1 P. Wms. 121; *Wood* v. *Downes*, 18 Ves., per Lord Eldon, at p. 127.

days before her death, of part of her money to her first cousin, with whom she had lived from her father's death for the five months previous to her own death, was upheld (*h*)

The same principle applies, of course, as against any person who takes upon himself the office and responsibilities of a guardian, although he is not legally so appointed (*i*).

Miscellaneous cases in which principle has been applied.

There are a variety of other instances in which this principle has been applied, such as the cases of gifts by nun to her *convent (*k*), by a patient to [* 495] his doctor (*l*), by a penitent to her confessor (*m*), by any person under the influence of a spiritual ascendancy in favour of the possessor of that ascendency, whether such possessor be a relation, as brother (*n*) or sister (*o*), or not, as merely a minister of religion (*p*), or by a person who is subject to superstitious fancies and delusions, in favour of the person who has worked upon those fancies and delusions (*q*), as by pretending to be a medium, and enabling a lady to hold converse with the spirit of her deceased husband (*r*).

Of course every case in which a person has taken upon himself to assume and exercise the functions which belong to a position of a confidential or fiduciary character is within this principle (*s*),

(*h*) *Taylor* v. *Johnston*, 19 Ch. D 603.

(*i*) *Osmond* v. *Fitzroy*, 3 P. Wms. 129; *Griffin* v. *De Veuille*, 3 P. Wms. 131, n.; *Hylton* v. *Hylton*, 2 Ves. 547.

(*k*) *Whyte* v. *Meade*, 2 Ir. Eq. 420; *M'Carthy* v. *M'Carthy*, 9 Ir. Eq. 620, S. C. 1 H. L. C. 703; *Re Metcalfe's Trusts*, 2 D. J. & S. 122.

(*l*) *Hunter* v. *Atkins*, 3 My. & K. 113, et supra; *Dent* v. *Bennett*, 7 Sim. 539, S. C. 4 My. & Cr. 269; *Gibson* v. *Russell*, 2 Y. & C. C. C. 104; *Pratt* v. *Barker*, 1 Sim. 7 S. C. 4 Russ. 507; *Billage* v. *Southbee*, 9 Hare, 534, 540; *Mitchell* v. *Homfray*, 8 Q. B. D. 587.

(*m*) *Parfitt* v. *Lawless*, L. R. 2 P. & D. per Lord Penzance, 468.

(*n*) *Sharp* v. *Leach*, 31 Beav. 491; and see *Sturge* v. *Sturge*, 12 Beav. 229; *Sercombe* v. *Sanders*, 34 Beav. 382.

(*o*) *Harvey* v. *Mount*, 8 Beav. 439.

(*p*) *Norton* v. *Relly*, 2 Ed. 286; *Huguenin* v. *Baseley*, 14 Ves. 273, 2 Wh. & Tu. L. C. 6th ed 597; *Nottidge* v. *Prince*, 2 Giff. 246.

(*q*) *Nottidge* v. *Prince*, 2 Giff. 246; *Kirwan* v. *Cullen*, 4 Ir. Ch. Rep. 322,

(*r*) *Lyon* v. *Home*, L. R. 6 Eq. 655.

(*s*) 1 Bac. Abr. 137, n.; 3 ibid. 780; *Hunter* v. *Atkins*, 3 My. & K. 113; *Broun* v. *Kennedy*, 33 Beav. 133, S. C, 4 D. J. & S. 217; *Tate* v. *Williamson*, L. R. 1 Eq. 528, S. C. L. R. 2 Ch. 55; *Mullvany* v. *Dillon*, 1 Ball & B. 409; *Parfitt* v. *Lawless*, L. R. 2 P. & D. 462.

Trifling gift to person in *confidential* relation upheld.

There is one limitation, however, to the application of this general principle. A mere trifling gift to a person who stands in a confidential or fiduciary relation, or a mere trifling liability incurred in his favour, will be upheld by the Court, unless there be proof not merely of the influence derived from the relation, but of *mala fides*, or of an undue or unfair exercise of the influence (*t*).

This principle does not depend on age or capacity of donor, or on nature of gift.

It must be observed that neither the age nor the capacity of the person conferring the benefit, nor the nature of the benefit conferred, affect the application of this general principle. Age and capacity are considerations which may be of great importance in cases where there is no confidential or fiduciary relation; but they are of little, if of any, importance in cases to which this principle applies. And as to the nature of the benefit, [* 496] the injury * done to the person by whom the benefit is conferred cannot depend upon its nature (*u*).

What undue influence consists in.

As to what amounts to undue influence and fraud, it is evident that no general rule can be laid down. This is a question for the judge to decide upon the circumstances of each particular case (*v*).

The following circumstances have been regarded as in a special degree probable marks of undue influence and fraud:—

The fact that the donor has not had any independent advice (*w*), the improvidence of the transaction (*x*), the

(*t*) *Rhodes* v. *Bate* L. R. 1 Ch., per Turner, L.J., 258; and see Pollock, Cont. 4th ed. 596.

(*u*) *Rhodes* v. *Bate*, L. R. 1 Ch. 257, per Turner, L.J. 258.

(*v*) Kerr, Fraud & Mis. 2nd ed. 159–162.

(*w*) *Griffiths* v. *Robins*, 3 Mad. 191; *Dent* v. *Bennett*, 4 My. & Cr. 269, 273; *Harvey* v. *Mount*, 8 Beav. 439; *Page* v. *Horne*, 11 Beav. 227; *Sturge* v. *Sturge*, 12 Beav. 229, 239; *Thornber* v. *Sheard*, 12 Beav. 589; *Cooke* v. *Lamotte*, 15 Beav. 243; *Gibson* v. *Russell*, 2 Y. & C. C. C. 204; *Sharp* v. *Leach*, 31 Beav. 491; *Rhodes* v. *Bate*, L. R. 1 Ch. 252; *Armstrong* v. *Armstrong*, Ir. R. 8 Eq. 1; *King* v. *Anderson*, Ir. R. 8 Eq. 625; *Turner* v. *Collins*, L. R. 7 Ch. 329; *Moxon* v. *Payne*; L. R. 8 Ch. 881; *Kempson* v. *Ashbee*, L. R. 10 Ch. 15; *Bainbrigge* v. *Browne*, 18 Ch. D. 188.

(*x*) *Bridgman* v. *Green*, Wilm. 58, 62, S. C. 2 Ves. 626; *Prideaux* v. *Lonsdale*, 1 D. J. & S. 433; *Harvey* v. *Mount*, 8 Beav. 439; *Sharp* v. *Leach*, 31 Beav. 491; *Mara* v. *Ray*, W. N. (1872) 127; *Coutts* v. *Acworth*, L. R. 8 Eq. 558; *Wollaston* v. *Tribe*, L. R. 9 Eq. 44; *Everitt* v. *Everitt*, L. R. 10 Eq. 405; *Armstrong* v. *Armstrong*, Ir. R. 8 Eq. 1; *Turner* v. *Collins*, L. R. 7 Ch. 329: and see *Beatson* v. *Beatson*, 12 Sim. 281; *Page* v. *Horne*, 11 Beav. 227.

age of the donor, whether very young or old, or in infirm health (*y*), the amount of the gift, and its proportion to the total amount of the donor's property (*z*), the statement of a fictitious valuable consideration (*a*), the deed having been obtained in order to meet one particular purpose and afterwards being made use of by the donee for another purpose (*b*), the fact that the effect of the gift or voluntary settlement was not really understood by the donor (*c*), and the fact that * there is no power of revocation in the deed, [* 497] and that this omission has not been brought to the notice of the donor (*d*).

If a confidential relation exists, important how *intention* to give is produced.

In cases where a confidential or fiduciary relation existed between the parties at the time the gift or voluntary settlement was made, the Court always pays especial regard to the question how the *intention* of the donor was produced; and considers whether the circumstances shew that all that care and providence was placed round the donor, as against those who advised him, which, from their situation and relation with respect to him, they were bound to exert on his behalf (*e*).

Undue influence as to Wills.

The influence which is undue in the case of a gift or voluntary settlement made *inter vivos* is very different from that which is required to set aside a will (*f*).

(*y*) *Griffiths* v. *Robins*, 3 Mad. 191; *Wright* v. *Proud*, 13 Ves. 136; *Anderson* v. *Elsworth*, 3 Giff. 154; *Prideaux* v. *Lonsdale*, 1 D. J. & S. 433; *Everitt* v. *Everitt*, L. R. 10 Eq. 405; *Kempson* v. *Ashbee*, L. R. 10 Ch. 15; *Bainbrigge* v. *Browne*, 18 Ch. 188, ante, pp. 488, 489; *Gibson* v. *Russell*, 2 Y. & C. C. C. 204.

(*z*) *Bridgman* v. *Green*, Wilm. 58, S. C. 2 Ves. 626; *Rhodes* v. *Bate*, L. R. 1 Ch. 258; but see ante, p. 461.

(*a*) *Bridgman* v. *Green*, Wilm. 58, S. C. 2 Ves. 626; *Gibson* v. *Russell*, 2 Y. & C. C. C. 204; *Wyse* v. *Lambert*, 16 Ir. Ch. Rep. 378; *Sharp* v. *Leach*, 31 Beav. 491; *Hughes* v. *Seanor*, 18 W. R. 108, 1122; and see ante p. 267.

(*b*) *Young* v. *Peachy*, 2 Atk. 254.

(*c*) *Huguenin* v. *Baseley*, 14 Ves. 300; *Cooke* v. *Lamotte*, 15 Beav. 243; *Billage* v. *Southee*, 9 Hare, 534; *Price* v. *Price*, 1 De G. M. & G. 308; *Anderson* v. *Elsworth*, 3 Giff. 154; *Sturge* v. *Sturge*, 12 Beav. 229; *Lyon* v. *Home*, L. R. 6 Eq. 655; *Coutts* v. *Acworth*, L. R. 8 Eq. 558; *Wollaston* v. *Tribe*, L. R. 9 Eq. 44; *Kempson* v. *Ashbee*, L. R. 10 Ch. 15; *Bainbrigge* v. *Browne*, 8 Ch. D, 188.

(*d*) Post, pp. 499 et. seq.

(*e*) Per Lord Eldon in *Huguenin* v. *Baseley*, 14 Ves. 300; *Armstrong* v. *Armstrong*, Ir. R. 8 Eq. 134; *Turner* v. *Collins*, L. R. 7 Ch. 329, 339; *Bainbrigge* v. *Browne*, 18 Ch. D. 188; *Taylor* v. *Johnston*, 19 Ch. D. 608–609; ante, p. 483.

(*f*) *Hindson* v. *Weatherill*, 5 De G. M. & G. 301, 311, 313; *Ravorth* v. *Marriott*, 1 My. & K. 643; *Parfitt* v. *Lawless*, L. R. 2 P. & D. 462; but see *Walker* v. *Smith*, 29 Beav. 394.

The undue influence which is adequate to set aside a will must be such a pressure as to overpower the volition without convincing the judgment; so that the testator's will, or the part of it impeached, is not the record of the testator's volition, but of some other person (*g*). To render influence legally undue there must be coercion (*h*).

The natural influence of persons who hold a confidential or fiduciary position in regard to the testator may lawfully be exerted to obtain a will or legacy, so long as the testator thoroughly understands what he is doing and is a free agent (*i*).

Burden of proof generally on person alleging undue influence.

Undue influence in the case of a will is never presumed whatever may be the position of the person who receives the benefit. In general, the burden of proof of undue influence lies on the person who alleges it (*k*), [* 498] but to this rule there is one exception. *A person who takes a benefit under a will which he has been instrumental in preparing or obtaining has thrown on him the onus of shewing the righteousness of the transaction (*l*).

What must be proved.

It must also be proved that the will or legacy was obtained by means of this undue influence or coercion (*m*) exercised in relation to the will itself, and that the circumstances which attended the execution of the will are inconsistent with any other hypothesis than that of undue influence (*n*).

Will set aside wholly or in part.

A will may be set aside, wholly or in part only, on the ground of undue influence or fraud (*o*). The grant of probate, not recalled, is conclusive proof that the will is the true will of the testator, and after such grant

(*g*) *Stulz* v. *Schæfle*, 16 Jur. 909; *Hall* v. *Hall*, L. R. 1 P. & D. 481; *Parfitt* v. *Lawless*, L. R. 2 P. & D. 462, 470; and see *Boyse* v. *Rossborough*, 6 H. L. C. 48, 49; *Williams* v. *Goude*, 1 Hagg. E. 581.

(*h*) *Wingrove* v. *Wingrove*, 11 P. D. 81.

(*i*) *Parfitt* v. *Lawless*, L. R. 2 P. & D. 469, 470.

(*k*) *Boyse* v. *Rossborough*, 6 H. L. C., per Lord Cranworth, 49; *Parfitt* v. *Lawless*, L. R. 2 P. & D. 470.

(*l*) *Ashwell* v. *Lomi*, L. R. 2 P. & D. 477; *Fulton* v. *Andrews*, L. R. 7 H. L., per Lord Hatherly, 472; *Hegarty* v. *King*, 5 L. R. Ir. 249, S. C. 7 L. R. Ir. 18.

(*m*) *Jones* v. *Godrich*, 5 Moo. P. C. 40; *Parfitt* v. *Lawless*, L. R. 2 P. & D. 462; *Wingrove* v. *Wingrove*, 11 P. D. at p. 83.

(*n*) *Boyse* v. *Rossborough*, 6 H. L. C. 51; *Longford* v. *Purdon*, 1 L. R. Ir. 81; and see Kerr, Fraud & Mis. 2nd ed. 297 et seq.

(*o*) *Hegarty* v. *King*, 5 L. R. Ir 249, S. C. 7 L. R. Ir. 18; *Allen* v. *M'Pherson*, 1 H. L. C. 191.

the will cannot be set aside on the ground of fraud or undue influence.

Exclusive jurisdiction of Probate Division.

The Probate Division of the High Court of Justice has exclusive jurisdiction on the question whether a will or any part of it was obtained by fraud or undue influence (*p*); and such question should be raised when probate is applied for.

Rules as to undue influence and fraud whether the same.

It is conceived that the foregoing principles apply to cases where the will or legacy has been obtained either by fraud or by undue influence. Fraud may or may not be a species of undue influence. Undue influence to invalidate a will means coercion, but fraud includes misrepresentation, which may consist as well in a mere concealment as in a positive misrepresentation of fact (*q*).

Power of revocation.

The view the Court takes of the question, whether a voluntary settlement is voidable if it does not contain a power of revocation, is different according as the settlement is impeached by persons who claim *adversely* to the settlor, or is impeached by the settlor or persons who claim under him (*r*).

When settlement impeached by persons claiming *adversely* to settlor.

*If it be impeached by a creditor (*s*), or a [*499] purchaser (*t*), who of course claim adversely to the settlor, the Court considers whether the provisions in the voluntary settlement are proper, having regard to the position of the settlor; and from this point of view the Court considers a power of revocation in such a settlement as a great mark of fraud against third persons (*u*).

by settlor or persons claiming under him.

It was formerly held that the *mere* absence of a power of revocation in a voluntary settlement was almost an adequate ground of itself for setting that settlement aside as against the settlor or persons who claim under him, as procured by fraud or undue influence, of which the absence of this power was regarded

(*p*) *Allen* v. *M'Pherson*, 1 H. L. C. 191; *Meluish* v. *Milton*, 3 Ch. D. 37; and see Theobald, Wills, 3rd ed. 65; Jud. Act, 1873, s. 34.

(*q*) See *Parfitt* v. *Lawless*, L. R. 2 P. & D. 470, 471; *Boyse* v. *Rossborough*, 6 H. L. C. 48, 49; *Meluish* v. *Milton*, 3 Ch. D. 27.

(*r*) *Dutton* v. *Thompson*, 23 Ch. D., per Cotton, L.J., 283.

(*s*) Ante, pp. 76, 111.

(*t*) Ante, pp. 209 et seq.

(*u*) *Dutton* v. *Thompson*, 23 Ch. D. 278.

as an almost certain sign. So Lord Hardwicke said: "No power of revocation being reserved in a voluntary conveyance hath always been held in this Court as a great ingredient in a charge of fraud for setting such conveyances aside, though this alone is not sufficient for the purpose" (*v*).

Toker v. *Toker.*

In *Toker* v. *Toker* (*w*), however, a voluntary settlement without power of revocation, executed by an aunt in favour of her nephew, and impeached by her as procured by the undue influence of her nephew, was upheld on the ground that it was intended to be irrevocable. Lord Justice Turner there laid down the principle that the absence of a power of revocation was a circumstance to be taken into account in determining such cases, and was a circumstance of more or less weight according to the facts of each particular case.

Phillips v. *Mullings.*

This principle was followed in *Phillips* v. *Mullings* (*x*), where a young man of improvident habits, and only twenty-two years of age, was induced to make a voluntary settlement without power of revocation of a part of his money, which he afterwards impeached [*500] *on the ground that he did not understand its nature. The settlement was upheld, a power of revocation in the circumstances being useless. Lord Hatherley, L.C., pointed out that whether there should be a power of revocation or not must depend upon the circumstances; and that it could not be laid down as a general rule that such a deed would be voidable unless it contained a power of revocation.

Hall v. *Hall.*

The authorities on this point were carefully reviewed, and *Toker* v. *Toker* (*y*) followed, by James, L.J., in the case of *Hall* v. *Hall* (*z*), where his Lordship said: "The true rule is that which was laid down by Lord

(*v*) *Philips* v. *Philips*, Coxe, MSS. B. B. 18; and see *Huguenin* v. *Baseley*, 14 Ves. 296; *Thornhill* v. *Evans*, 332, as stated in the Index, tit. Fraud; *Coutts* v. *Acworth*, L. R. 8 Eq. 588; *Wollaston*, v. *Tribe*, L. R. 9 Eq. 44; *Everitt* v. *Everitt*, L. R. 10 Eq. 405; *Mountford* v. *Keene*, 19 W. R. 708; *Henshall* v. *Fereday*, 21 W. R. 240; *Horan* v. *Macmahon*, 15 L. R. Ir. 471; and see *Nanney* v. *Williams*, 22 Beav. 452; *Foreshaw* v. *Welsby*, 30 Beav. 243; *Anderson* v. *Elsworth*, 3 Giff. 154; *Sharp* v. *Leach*, 10 W. R. 878; Dav. Prec. 3rd ed. vol. 3, 696 et seq.; Kerr, Fraud & Mis. 2nd ed. 159–162.

(*w*) 31 Beav. 629, S. C. 3 D. J. & S. 487.

(*x*) L. R. 7 Ch. 244.

(*y*) 3 D. J. & S. 487.

(*z*) L. R. 8 Ch. 430.

Justice Turner in *Toker* v. *Toker* (*a*), that the absence of a power of revocation is a circumstance to be taken into account, and is of more or less weight according to the other circumstances of each case" (*b*).

This view has been also recently followed with approval by the Court of Appeal in Ireland in *Armstrong* v. *Armstrong* (*c*).

Was the voluntary settlement the free act of settlor?

The Court considers in each particular case whether the voluntary settlement was the free determined act of the settlor, and, if upon the evidence such appears to have been the case, the Court will uphold the settlement and not enter into the question whether it contains provisions which were not proper to be inserted in such a settlement.

It is not the province of a Court of Justice, said Jessel, M.R., in *Dutton* v. *Thompson* (*d*), to decide on what terms or conditions a man of competent understanding may choose to dispose of his property. If he thoroughly understands what he is about, it is not the duty of a Court of justice to set aside a settlement which he chooses to execute, on the ground that it contains clauses which are not proper.

The question, therefore, in each case is, did the settlor really understand the effect of the voluntary settlement he executed?

Absence of power may be *evidence* of undue influence.

* It is from this point of view only that the [* 501] omission of the power of revocation becomes material, and may be a reason for setting such settlement aside. It *may* be evidence that the settlor did not really understand what he was doing, and so of undue influence (*e*); but whether it would be so or not would of course depend upon all the circumstances of the case. So it would be material if it was proved that the settlor did not intend an irrevocable settlement, that the settlement was not intended in the event which actually hap-

(*a*) 3 D. J. & S. 487, 491.
(*b*) L. R. 8 Ch. 438; *Henry* v. *Armstrong*, 18 Ch. D. 668.
(*c*) Ir. R. 8 Eq. 1, 45.
(*d*) 23 Ch. D. 281; but see *Phillips* v. *Mullings*, L. R. 7 Ch. at p. 248.
(*e*) *Toker* v. *Toker*, 3 D. J. & S. 491; *Dutton* v. *Thompson*, 23 Ch. D., per Jessel, M.R., 281; and see *Mara* v. *Ray*, W. N. (1872) 127.

pened (*f*), or if the settlement itself were such, or made under such circumstances, as to be unreasonable and improvident, apart from any question of undue influence (*g*).

Voluntary settlements upheld without power of revocation.

So a voluntary settlement without a power of revocation has been upheld against the settlor, although the solicitor who prepared the deed never called the attention of the settlor to the fact of its omission, or advised its insertion (*h*). So an irrevocable voluntary settlement made by a man of almost all his property when about to engage in business on the Stock Exchange was upheld against him, because the object of that deed was to protect his wife and children, and the insertion of the power of revocation would have been inconsistent with this (*i*).

So where it is proved that the settlor intended to make an irrevocable voluntary settlement, the absence of a power of revocation is immaterial (*k*); as where the object of the settlement was to protect the settlor against the importunity of his relations (*l*), or to prevent property from devolving on particular people (*m*), or to protect the settlor, who had only just attained his majority, against his own extravagant and improvident habits (*n*).

Where a testator had executed a voluntary declaration of trust by which he had given his wife a power [* 502] of appointment, and had * kept it under his control, and at his death the deed could not be found, the Court would not infer that the lost deed contained a power of revocation (*o*).

Probate duty when payable.

It may be mentioned that by the Customs and Inland Revenue Act, 1881 (*p*), if a life interest, or an absolute power of revocation, is reserved to a settlor who dies

(*f*) *Nanney* v. *Williams*, 22 Beav. 452; *Forshaw* v. *Welby*, 30 Beav. 243.

(*g*) *Hall* v. *Hall*. L. R. 8 Ch., per Lord Selborne, L.C., 440.

(*h*) *Toker* v. *Toker*, 3 D. J. & S. 487, 492; *Hall* v. *Hall*, L. R. 8 Ch. 430; and see *Horan* v. *Macmahon*, 15 L. R. Ir. 471.

(*i*) *Henry* v. *Armstrong*, 18 Ch. D. 668.

(*k*) *Hall* v. *Hall*, L. R. 8 Ch. 437, 438, 440; *Armstrong* v. *Armstrong*, Ir. Rep. 8 Eq. 1.

(*l*) *Procter* v. *Gregg*, 21 W. R. 240, n.

(*m*) *Long* v. *Donegan*, 21 W. R. 830.

(*n*) *Phillips* v. *Mullings* L. R. 7 Ch. 244, 248; *Bell* v. *Thompson*, W. N. (1878) 121.

(*o*) *In re Booker*, 34 W. R. 346.

(*p*) 44 Vict. c. 12, s. 38 (2) C.

on or after June 1, 1881, in a settlement of personal estate, such personal estate will be liable to probate duty.

Effect of undue influence or fraud on marriage settlements.

A marriage settlement will not be set aside on the ground of undue influence or fraud as against a party innocent of that undue influence or fraud (*q*).

The general rule, that a gift or voluntary settlement obtained by undue influence or fraud is voidable at the option of the donor, applies, however, to all the limitations in a marriage settlement which are voluntary (*r*). The volunteer stands in the same position as if he took under an instrument which contained no limitation for value.

Who can set aside voidable deed.

The right to set aside a deed voidable on the ground of undue influence or any of the other causes noticed above may be exercised by the donor's executor (*s*), by his devisee (*t*), by his heir (*u*), by his residuary legatee (*v*), or by his trustee in bankruptcy (*w*).

The representatives of a donor cannot after his death set aside a gift or voluntary settlement made by him which if he had lived he himself would not have set aside (*x*); but of course if the donor has complained of the transaction, and has in his lifetime started proceedings to annul it, his representative will be treated as standing exactly in his place, and such deed may be set aside even as against the representatives of the donee (*y*).

Third person cannot.

* It seems, however, that the Court will not [* 503] set aside a deed which is voidable on any of these grounds at the instance of any *third* person who sets up such ground (*z*)

(*q*) *Barrow* v. *Barrow*, 2 Dick. 504; *Kevan* v. *Crawford*, 6 Ch. D. 29; ante, p. 91.

(*r*) *Wollaston* v. *Tribe*, L. R. 9 Eq. 44; *Maunsell* v. *Maunsell*, 1 L. R. Ir. 529, 539; ante, pp. 342, 358.

(*s*) *Hunter* v. *Atkins*, 3 My & K. 113; *Mountford* v. *Keene*, 19 W. R. 708.

(*t*) *Gresley* v. *Mousley*, 4 De G. & J. 78.

(*u*) *Holman* v. *Lynes*, 4 De G. M. & G. 270; *Anderson* v. *Elsworth*, 3 Giff. 154.

(*v*) *Long* v. *Donegan*, 21 W. R. 830; *Coutts* v. *Acworth*, L. R. 8 Eq. 558.

(*w*) *Ford* v. *Olden*, L. R. 3 Eq. 461.

(*x*) *Mitchell* v. *Homfray*, 8 Q. B. D. 591, per Lord Selborne, L.C.; and see *Wright* v. *Vanderplant*, 8 De G. M. & G. 133.

(*y*) *Phillipson* v. *Kerry*, 32 Beav. 623, S. C. 637.

(*z*) Poll. Cont. 4th ed. 594; and see *In re Metcalfe's Trusts*, 2 D. J. & S. 122; *Larrett* v. *Bank of England*, W. N. (1886) 47.

Principle ceases to apply when confidential relation is over.

This principle, that a gift or voluntary settlement made to or in favour of a person who occupies a confidential or fiduciary position in relation to the donor is voidable at the option of that donor, of course does not apply if, at the time the gift or voluntary settlement is made, that relation has *entirely* ceased, and the donor is no longer subject to its influence (*a*).

The difficulty is in such cases that although the relation may have actually ceased, yet, as the person who once stood in that relation to the donor still retains the knowledge he so acquired, he does not by merely giving up his office at once divest himself of his confidential or fiduciary character (*b*).

What is proof that relation has ceased.

When a relation of confidence is once established, either some positive act or some complete case of abandonment must be shewn in order to determine it. The mere fact that the relation is not called into action is not sufficient of itself to determine it, for this may well have arisen from there having been no occasion to resort to it (*c*).

Must relation be over in all respects or merely *in hac re?*

It does not appear to have been decided whether, if confidential or fiduciary relation has merely ceased in relation to the particular gift or voluntary settlement, the gift or voluntary settlement will be upheld, or whether it must have ceased in all respects (*d*).

Third persons can take no benefit under gift or voluntary settlement void between the parties.

The Court will not allow *third* persons, who claim as volunteers, to take any benefit under a gift or voluntary settlement declared void between the parties to it on the [* 504] ground of fraud or undue * influence, although such *third* persons were in no way parties to the fraud or undue influence (*e*).

So a person taking a lease granted by the lessor to his agent with notice of the existing relation has the same

(*a*) *Huguenin* v. *Baseley*, 14 Ves. 273, 299; *Richards* v. *French*, 22 L. T. (N.S.) 329; *Tate* v. *Williamson*. L. R. 2 Ch. 55, 65; *Mitchell* v. *Homfray*, 8 Q. B. D. 587; Kerr, Fraud & Mis. 2nd ed. 330, ante, pp. 484, 488.

(*b*) See *Carter* v. *Palmer*, 8 Cl. & F. 657, 705; *Re Holmes' Estate*, 3 Giff. 345, 346.

(*c*) *Rhodes* v. *Bate*, L. R. 1 Ch. 259, 260; and see *Mitchell* v. *Homfray*, 8 Q. B. D. 587.

(*d*) *Tomson* v. *Judge*, 3 Drew. 316; *Rhodes* v. *Bate*, L. R. 1 Ch. 259, 260; ante, p. 493.

(*e*) *Bridgman* v. *Green*, Wilm. 58, 64–5, S. C. 2 Ves. 626; *Huguenin* v. *Basely*, 14 Ves. 273; *Scholefield* v. *Templer*, Joh. 155; *Smith* v. *Kay*, 7 H. L. C. 750; *Rhodes* v. *Bate*, L. R. 1 Ch. 258.

liability cast upon him as the agent had, and the onus of proving that it was not obtained by undue influence on the agent's part (*f*). So a person getting security from one to whom his debtor stands in a confidential relation of which he has notice, must prove that no undue influence was exerted and that the transaction was fully understood by the person giving the security (*g*).

Against whom does inference of undue influence operate?

Where the donee stands in a confidential or fiduciary relation to the donor, the inference of undue influence operates against the person who is able to exercise that influence, and also against every person who claims under him with notice of the equity thereby created, or with notice of the circumstances from which the Court infers the equity (*h*).

This inference of undue influence does not, however, operate against any other person. So it would not operate against a person who is not shewn to have taken with notice of the circumstances under which the gift or voluntary settlement was made (*i*).

So a payment to a creditor of the father voluntarily made by his daughter six months after she came of age, to whom knowledge of undue influence exercised by the father on his daughter could not be imputed, was upheld (*k*).

A person who is a bonâ fide purchaser in the first instance for * valuable consideration without no- [* 505] tice; if the consideration be not a debt already due, is protected (*l*); and so of course is a bonâ fide purchaser for value without notice from the donee (*m*).

(*f*) *Molony* v. *Kernan*, 2 D. & War. 31, 40–41.

(*g*) *Rhodes* v. *Cook*, 2 Sim. & St. 488; *Maitland* v. *Irving*, 15 Sim. 437; *Maitland* v. *Backhouse*, 16 Sim. 58, S. C. 63; *Archer* v. *Hudson*, 7 Beav. 551; *Baker* v. *Bradley*, 2 Sm. & Giff. 531, S. C. 7 De G. M. & G. 597; *Espey* v. *Lake*, 10 Hare, 260; *Berdoe* v. *Dawson*, 34 Beav. 603; *Sercombe* v. *Sanders*, 34 Beav. 382; and see *Ardglasse* v. *Muschamp*, 1 Vern. 237; *Rolfe* v. *Gregory*, 34 L. J. (N.S.) Ch. 274; *Wyse* v. *Lambert*, 16 Ir. Ch. Rep. 378; *Kempson* v. *Ashbee*, L. R. 10 Ch. 15.

(*h*) *Bainbrigge* v. *Browne*, 18 Ch. D., per Fry, J., 197; and see *Kempson* v. *Ashbee*, L. R. 10 Ch. 21.

(*i*) *Bainbrigge* v. *Browne*, 18 Ch. D., per Fry, J., 197.

(*k*) *Thornber* v. *Sheard*, 12 Beav. 589; and see *Corbett* v. *Brock*, 20 Beav. 524, S. C. 531; *Bentley* v. *Mackay*, 31 Beav. 143, S. C. 4 D. F. & J. 279.

(*l*) *Blackie* v. *Clark*, 15 Beav. 595, 601; and see *Bainbrigge* v. *Browne*, 18 Ch D. 199.

(*m*) *Greenslade* v. *Dare*, 20 Beav. 284; *Corbett* v. *Brock*, 20 Beav. 524, 530, S. C. 531.

It appears doubtful whether a gift or voluntary settlement can be set aside, on the ground of undue influence, if the influence has been exercised, *not* by the person who obtains the benefit, but by a third person who derives no benefit whatever (*n*).

In the application of the foregoing principles there is no distinction between the case of a person who himself exercises a direct undue influence, and of a person who makes himself a party with the person who exercises that undue influence (*o*).

Gift or voluntary settlement how confirmed.

A gift or voluntary settlement originally voidable on the ground of undue influence or any of the other causes noticed above (*p*), may be confirmed and rendered unimpeachable by the donor in either of two ways.

1. The donor may confirm the transaction by his subsequent acts, whether inter vivos, or by his will.

By act inter vivos;

In *Crowe* v. *Ballard* (*q*) Lord Thurlow said: "If a gentleman of rank, fortune, and honour, under age, in distress, or otherwise, gives a bond, and afterwards conceives that he has made a hard bargain, and, knowing that a bond is bad, will give a new bond, that will maintain possession of the right of the holder of the bond, and this act shall be said to be a confirmation; *but not any act done under the influence of the former transaction, and the opinion that the bond is good.*"

In *Moxon* v. *Payne* (*r*), James, L.J., laid down the principles by which the question of confirmation of any voidable transaction was examined by the Court. To [* 506] uphold such transaction *there must be full knowledge of all the facts, full knowledge of the equitable rights arising out of those facts, and an *absolute release from the undue influence by means of which the frauds were practised.* To make a confirmation or

(*n*) *Wycherley* v. *Wycherley*, 2 Eden, 175; *Bentley* v. *Mackay*, 31 Beav. 143, S. C. 4 D. F. & J. 279.

(*o*) *Ardglasse* v. *Pitt*, 1 Vern. 238; *Espey* v. *Lake*, 10 Hare, 260; *Wyse* v. *Lambert*, 16 Ir. Ch. 379; and see *Kempson* v. *Ashbee*, L. R. 10 Ch. 15.

(*p*) *Cann* v. *Cann*, 1 P. Wms. 723, 727; *Cole* v. *Gibson*, 1 Ves. 503, 507; *Stump* v. *Gaby*, 2 De G. M. & G. 623; *Jarratt* v. *Aldam*, L. R. 9 Eq. 463; *Sandeman* v. *Mackenzie*, 1 J. & H. 613; ante, p. 496.

(*q*) 3 Bro. C. C. 117.

(*r*) L. R. 8 Ch. 881, 885.

compromise of any value the parties must be at arm's length, on equal terms, with equal knowledge, and with sufficient advice and protection.

So where a young lady, scarcely twenty-one years of age, executed a bond voidable on the ground of undue influence, and six years afterwards, under clear pressure, executed a new bond for the same purpose, the new bond was declared void (*s*). The person who elects to confirm the voidable transaction must know that it was voidable at his option; and must elect to confirm it as a free unbiassed act (*t*). If there is no knowledge of the invalidity of the transaction, that invalidity cannot be cured by confirmation of it.

It is not necessary that the transaction be formally ratified, if it can be proved to have been adopted with the determination not to impeach it (*u*).

Of course, where a person confirms a portion of a deed, with nothing more, that operates as a confirmation of the whole transaction (*v*).

A gift or voluntary settlement originally voidable may also be wholly or in part confirmed by the donor's will, whether the confidential or fiduciary relation has ceased before the death of the donor (*w*), or still subsists at his death (*x*), unless the will is merely part of the same scheme (*y*). or by Will.

2. The donor may also confirm the transaction by mere acquiescence, without any positive act of confirmation (*z*). *Acquiescence in a transac- [* 507] tion impeachable on the ground of ignorance of rights, mistake, or misapprehension, after a full knowledge of By acquiescence.

(*s*) *Kempson* v. *Ashbee*, L. R. 10 Ch. 15; ante, p. 489.
(*t*) *Cocking* v. *Pratt*, 1 Ves. 401; *Wood* v. *Downes*, 18 Ves. 122, 128; *Roche* v. *O'Brien*, 1 Ball & B. 330, 339, and cases there cited; *Dunbar* v. *Tredenneck*, 2 Ball & B. 304, 317; *Savery* v. *King*, 5 H. L. C. 627; *Mitchell* v. *Homfray*, 8 Q. B. D. 587.
(*u*) *Wright* v. *Vanderplank*, 8 De G. M. & G. 147; *Mitchell* v. *Homfray*, 8 Q. B. D. 591.
(*v*) *Milner* v. *Harewood*, 18 Ves. 259, 277; *Jarratt* v. *Aldam*, L. R. 9 Eq. 463.
(*w*) *Mitchell* v. *Homfray*, 8 Q. B. D. 587; and see *Bizzey* v. *Flight*, 3 Ch. D. 269.
(*x*) *Stump* v. *Gaby*, 2 De G. M. & G. 623.
(*y*) *Waters* v. *Thorn*, 22 Beav. 547; *Lyon* v. *Home*, L. R. 6 Eq. 655.
(*z*) *Wright* v. *Vanderplank*, 2 K. & J. 1, S. C. 8 De G. M. & G. 146–7.

those rights has been obtained, or the person who could have set aside the transaction has become aware of his mistake, will confirm the transaction and render it unimpeachable (*a*).

Again, a gift obtained by fraud or undue influence cannot be set aside by the donor, if, after he has become aware of the fraud, or after the influence by which the gift was obtained has ceased, or the confidential or fiduciary relation has terminated, he has acquiesced in the transaction, knowing at the same time of his power to set it aside (*b*).

But an agreement which is made inoperative by a collateral fraudulent agreement cannot be set up as valid by abandoning the collateral agreement (*c*).

The onus lies on the person who sets up acquiesence as a defence to prove the facts from which it can be inferred (*d*).

Delay when a bar.

Delay where it does not operate as a statutory or positive bar operates simply as evidence of assent or acquiescence (*e*). In considering the question of mere delay two most important circumstances are, the length of the delay, and the nature of the acts done during the interval. The question is always one of the circumstances of each particular case, and no more precise rule seems possible (*f*).

In general, no lapse of time, however great, will protect the parties to a fraud which is clearly proved (*g*).

In special cases *mere* lapse of time has been held un-

(*a*) *Hoghton* v. *Hoghton*, 15 Beav. 278, 314; *Life Association of Scotland* v. *Siddal*, 3 D. F. J. 74; *Earl Beauchamp* v. *Winn*, L. R. 6 H. L. 234, 235; and see Kerr, Fraud & Mis. 2nd ed. 332 et seq.

(*b*) *Wright* v. *Vanderplank*, 2 K. & J. 1, S. C. 8 De G. M. & G. 133, 141, 148; *Blagrave* v. *Routh*, 2 K. & J. 509, S. C. 8 D. M. & G. 620, 626; *O'Brien* v. *Lewis*. 4 Giff. 221.

(*c*) *Moxon* v. *Payne*, L. R. 8 Ch. 881, 886.

(*d*) *Life Association of Scotland* v. *Siddall*, 3 D. F. & J. 77, per Lord Campbell, L.C.

(*e*) *Life Association of Scotland* v. *Siddall*, 3 D. F. & J. 72.

(*f*) *Lindsay Petroleum Co.* v. *Hurst*, L. R. 5 P. C. 241, 242; and *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1279, per Lord Blackburn; see Kerr, Fraud and Mis. 2nd ed. 332 et seq.

(*g*) *Bandon* v. *Becher*, 3 Cl. & F. 479; *Bowen* v. *Evans*, 2 H. L. C. 257, 282; and see *Hatch* v. *Hatch*, 9 Ves. 292; and *Turner* v. *Collins*, L. R. 7 Ch. 342.

der the *circumstances sufficient to prevent a [* 508] deed being set aside on the ground of fraud, or undue influence, or of the existence at the date of the deed of a confidetial or fiduciary relation between the parties. But during the continuance of the relation, less weight is given to the lapse of time than is justly due to it when no such relation subsists (*h*).

So where forty years had elapsed between the transaction complained of and the institution of the suit to impeach it, the confidential or fiduciary character on which relief was founded having de facto ceased for a long period, evidence having been lost, and the position of matters materially altered, Sir G. J. Turner, V.C., dismissed the bill, saying (*i*): "Under these circumstances I think I should not be going too far in holding that this bill ought to be dismissed upon the ground of length of time only."

In *Turner* v. *Collins* (*k*), a deed of gift from a son to his father made in 1855, but not impeached by the son till 1869, although he had complained of it and had taken advice in 1862, was upheld, except as to a particular power which was struck out of the deed.

And where there has been laches and acquiescence, after the confidential or fiduciary relation has been completely dissolved, the Court will not relieve (*l*).

And delay is a bar when during the interval the rights and liabilities of others have been varied (*m*).

Delay when not a bar.

But lapse of time will not prevent relief where the influence, by an undue exertion of which the gift or voluntary settlement was obtained, exists until the action is brought. So delay is no bar when, having regard to all the circumstances of the case, it is not unreasonable. In *Kempson* v. *Ashbee* (*n*) a young lady in 1859 joined her stepfather in a bond as his surety to mature in six years. In 1866, under pressure from

(*h*) See *Gresley* v. *Mousley*, 4 De G. & J. 95–96.
(*i*) In *Beaden* v. *King*, 9 Hare, 499, 533; and see *Wright* v. *Vanderplank*, 2 K. & J. 1, S. C. 8 De G. M. & G. 133, 146–7, 149; *Clanricarde* v. *Henning*, 30 Beav. 175.
(*k*) L. R. 7 Ch. 329; ante, p. 489.
(*l*) *Blagrave* v. *Routh*, 2 K. & J. 509, S. C. 8 De G. M. & G. 620; *Turner* v. *Collins*, L. R. 7 Ch. 341–342.
(*m*) *Ridgway* v. *Newstead*, 3 D. F. & J. 483–484.
(*n*) L. R. 10 Ch. 15; ante, p. 489.

[* 509] him, she joined in * executing a new bond as his surety for the sum then due and arrears of interest. In 1872 active proceedings were *first* taken against her, when she at once filed a bill to impeach the bonds, which were held void against her. And coverture is only in any case not within the Married Women's Property Act, 1882, an excuse for delay (*o*).

Mere delay matters little or nothing so long as the position of all the parties to the transaction is not in any substantial way altered, whether by delay, or by anything done during the interval (*p*). And of course delay is immaterial so long as the person delaying does not know his rights, or is ignorant of the fact that the transaction can be impeached (*q*). To lose a remedy by laches or delay, it is, if not universally, at all events ordinarily necessary that there should be sufficient knowledge of the facts constituting the title to relief (*r*).

(*o*) *Hatch* v. *Hatch*, 9 Ves. 292; *Wollaston* v. *Tribe*, L. R. 9 Eq. 44. But see now 45 & 46 Vict. c. 75; *Lowe* v. *Fox*, 15 Q. B. D. 667.

(*p*) *Wollaston* v. *Tribe*, L. R. 9 Eq. 44, 50; *Ridgway* v. *Newstead*, 3 D. F. & J. 485; *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 239–240; *King* v. *Anderson*, I. R. 8 Eq. 615.

(*q*) *Cocking* v. *Pratt*, 1 Ves. 401; *Wood* v. *Downes*, 18 Ves. 122, 130; *Roche* v. *O'Brien*, 1 Ball & B. 330, 342, where a deed confirmed by a subsequent deed was set aside after thirty-four years; *D'Arcy* v. *D'Arcy*, 1 Hayes & J. 115; *Morse* v. *Royal*, 12 Ves. 373, 374; *Life Assurance of Scotland* v. *Siddall*, 3 D. F. & J. 58; Sug. V. & P. 14th ed. 252–3.

(*r*) *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. at p. 241.

*PART VI. [*511]

MISCELLANEOUS POINTS, PRACTICE UNDER THE STATUTES OF ELIZABETH, AND COSTS.

CHAPTER I.

MISCELLANEOUS POINTS AND PRACTICE.

Settlor neither restrained from selling nor aided under 27 Eliz. c. 4.

As was decided by Lord Eldon (*a*), the Court will not restrain a man who has previously made a voluntary settlement of real property from selling it to a purchaser; nor, on the other hand, will it in general help him to frustrate his own deed (*b*). If, however, the purchaser be willing to complete the purchase on having a good title shewn, as he can, by so doing, remove all objection to his title as regards the voluntary settlement, it seems that the Court will, in this exceptional case, enforce specific performance against him (*c*). Where the title depends on the invalidity of a previous voluntary instrument, the Court will not, at the instance of the author of that instrument, order specific performance of a contract to sell for value against an unwilling purchaser (*d*).

In such cases the Court remains neutral; it will not impede the sale whereby the vendor seeks to get rid of the voluntary settlement, nor will it assist him in doing so. The reasons why the Court will not in general enforce, on behalf of the voluntary settlor, *a con- [* 512] tract for sale of that property, are these: it will not help him to avoid his own deed, and a vendor has no right

(*a*) *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84; *Barton* v. *Vanheythuysen*, 11 Hare, 131; *Rosher* v. *Williams*, L. R. 20 Eq. 218.

(*b*) *Clarke* v. *Willott*, L. R. 7 Ex. 318; *General Meat Supply Association* v. *Bouffler*, 40 L. T. (N.S.) 126, S. C. 41 L. T. (N.S.) 719.

(*c*) *Peter* v. *Nicolls*, L. R. 11 Eq. 391; Fry, Sp. Pf. 2nd ed. 176, 177.

(*d*) *Clarke* v. *Willott*, L. R. 7 Ex. 318; Fry, Sp. Pf. 2nd ed. 176, 177.

to insist on a purchaser making his title good by accepting it (*e*).

And the Court will not interfere actively against a volunteer through the medium of a person claiming only through him who created the voluntary settlement (*f*); for the voluntary conveyance is void only as against a purchaser. So, in general, a purchaser alone can induce the Court to lend its aid in removing it, and the settlor cannot enforce the specific performance of the contract (*g*) except as against a willing purchaser (*h*).

So a purchaser of property the subject of a voluntary settlement has been held entitled to recover back his deposit from the vendor (*i*).

Settlor cannot cut down the settlement by his own admissions.

And where the settlor made a subsequent mortgage of the land in consideration of *moneys to be then afterwards advanced*, it was held that declarations or admissions, implied or expressed, of the mortgagor, were not admissible as evidence after the mortgagor's death that money had actually been advanced upon the mortgage (*k*).

The Court, however, under 22 & 23 Vict. c. 61, s. 5, will restrain a husband against whom a decree of divorce has been obtained from selling real estate comprised in a post-nuptial settlement made by the husband which recited an ante-nuptial agreement, pending the result of an inquiry as to the settlement (*l*).

Can creditors of deceased settlor enforce specific performance?

The question has been raised, but not decided, in *Johnson* v. *Legard* (*m*), whether the creditors of a voluntary settlor after his death stand in a better position

(*e*) *Clarke* v. *Willott*, L. R. 7 Ex. 313.

(*f*) Per Lord Hatherly in *Dolphin* v. *Aylward*, L. R. 4 H. L. 486, 502.

(*g*) *Smith* v. *Garland*, 2 Mer. 123, 127, where Sir W. Grant acted upon the opinion he had previously expressed in *Burke* v. *Dawson*, Rolls, March 1805 (MS.); Sug. V. & P. 14th ed. 720; *Johnson* v. *Legard*, 3 Mad. 283; S. C. T. & R. 281; and see *Hinton* v. *Hinton*, 2 Ves. 631–3; *Davenport* v. *Bishopp*, 2 Y. & C. C. C. 451, S. C. 1 Phil. 698; Sug. H. L. 153; *Doe* v. *Webber*, 1 Ad. & E. 733; *Rosher* v. *Williams*, L. R. 20 Eq. 218; Fry, Sp. Pf. 2nd ed. 176, 177.

(*h*) *Peter* v. *Nicolls*, L. R. 11 Ex. 391.

(*i*) *Clarke* v. *Willott*, L. R. 7 Ex. 313; *General Meat Supply Association* v. *Bouffler*, 40 L. T. (N.S.) 126, S. C. 41 L. T. (N.S) 719.

(*k*) *Doe* v. *Webber*, 1 Ad. & E. 733, 740; ante, p. 219.

(*l*) *Watts* v. *Watts*, 24 W. R. 623.

(*m*) 3 Mad. 283, S. C. T. & R. 285.

than the settlor did, so as to be able to compel specific performance of a contract for sale entered *into [* 513] by the settlor. It is conceived that, as their rights are those, and those only, of the settlor, and as the Court would not assist him to avoid his own deed, they could not compel specific performance of such a contract.

Contract of sale enforced by purchaser,

But, on the other hand, specific performance of an agreement to sell property previously the subject of a voluntary settlement, will be ordered at the instance of the purchaser (*n*), So an equitable mortgagee's title will be enforced (*o*), even though he entered into the contract with notice of the settlement (*p*), and though the settlement was supported by meritorious consideration (*q*), and as against a legal estate vested in parties deriving under voluntary limitations in a marriage settlement (*r*). So a decree has been made though the settlor was a feme covert (*s*); and although the volunteers (a complete trust having been created) had filed a bill, which they could sustain, to have the trusts carried into execution, and although that suit was pending (*t*).

unless of leaseholds,

A subsequent purchaser cannot enforce specific performance of a contract for the sale to him of leasehold property, whether the only property, or merely a part

(*n*) *Leach* v. *Dean*, 1 Ch. Rep. 78, and see the decree L. R. 1 Ch. 461 ; *Parry* v. *Cawarden*, 2 Dick. 544 ; *Willats* v. *Busby*, 5 Beav. 193; *Daking* v. *Whimper*, 26 Beav. 568 ; *Currie* v. *Nind*, 1 My. & Cr. 17, S. C. 5 L. J. (N.S.) Ch. 169, where the decree is given; *Stackpoole* v. *Stackpoole*, 4 D. & War. 320, 352–3; *Buckle* v. *Mitchell*, 18 Ves. 100; *Lister* v. *Turner*, 5 Hare, 281, 291 ; *Rosher* v. *Williams*, L. R. 20 Eq. 213. For the form of a decree enforcing (at the suit of a purchaser) an agreement to buy property the subject of a previous voluntary settlement, see Seton, 4th ed. 1374; and for decree against vendor (who had made a voluntary settlement of the estate) saving the rights of an absent claimant under the settlement, see *Currie* v. *Nind*, 5 L. J. (N.S.) Ch. 172, and *Willats* v. *Busby*, 5 Beav. 200.

(*o*) *Ede* v. *Knowles*, 2 Y. & C. C. C. 172, where the decree is given, p. 180; *Lister* v. *Turner*, 5 Hare, 281, where there was a contract to execute a legal mortgage with power of sale, and the property was ordered to be sold; see 5 Hare, 293 ; Seton, 4th ed. 1374.

(*p*) *Buckle* v. *Mitchell*, 18 Ves. 100 ; *Butterfield* v. *Heath*, 15 Beav. 408.

(*q*) *Parry* v. *Cawarden*, 2 Dick. 544 ; *Shaw* v. *Standish*, 2 Vern. 327.

(*r*) *Johnson* v. *Legard*, 3 Mad. 283, S. C. T. & R. 281 ; *Stackpoole*, v. *Stackpoole*, 4 D. & War. 320, 352.

(*s*) *Butterfield* v. *Heath*, 15 Beav. 408; ante, p. 284.

(*t*) *Pulvertoft* v. *Pulvertoft*, 18 Ves. 92; *Metcalfe* v. *Pulvertoft*, 1 V. & B. 180, S. C. 2 V. & B. 200; 2 Spence, Eq. Jur. 289.

of the property, comprised in a settlement; for such settlement, so far as regards the leasehold property comprised in it, is not voluntary (*u*).

against subsequent purchasers from him.

Where the vendor bought the property from the [* 514] original settlor, *on a resale he can compel a purchaser from him to complete the purchase, although the title depends on the invalidity of the first settlement (*v*). The reason of this seems to be that the Court acts on the presumption that the original settlement has not been made good by matter ex post facto (*w*).

Parties to action for specific performance.

The general rule in an action for specific performance of a contract is that all the parties to the contract are the only necessary parties to the action (*x*).

Where, however, the action is brought by a purchaser against the voluntary settlor, the proper course seems to be to make defendants, not only the vendor, but also the trustees of the voluntary settlement, and the persons beneficially interested under it (*y*). The ground of this is that no purchaser of property subject to a settlement alleged to be voluntary would take the title without being satisfied that the settlement was void against him: it would otherwise be difficult to effect any sale of property comprised in a voluntary settlement; so that not to allow the volunteers to be made parties would go far to destroy the effect of the statute (*z*).

Permanent improvements when allowed for.

In granting relief against a person in possession under a title which is only constructively fraudulent, the Court will reimburse him for any permanent improvements (*a*), whether the relief is granted in favour of a

(*u*) *Marsh* v. *Earl Granville*, 24 Ch. D. 25; *In re Lulham*, 32 W. R. 1013, S. C. 33 W. R. 788; ante, p. 258.

(*v*) *Currie* v. *Nind*, 1 My. & Cr. 17; *Butterfield* v. *Heath*, 15 Beav. 408; Fry, Sp. Pf. 2nd ed. 391.

(*w*) Fry, Sp. Pf. 2nd ed. 391.

(*x*) *Mole* v. *Smith*, Jac. 490; *Tasker* v. *Small*, 3 My. & Cr. 63, overruling S. C. 6 Sim. 625; Fry, Sp. Pf. 2nd ed. 62, 73, 76, 80; *In re Lulham*, 32 W. R. 1013, S. C. 33 W. R. 788.

(*y*) *Holford* v. *Holford*, 1 Ch. Ca. 217; *Willats* v. *Busby*, 5 Beav. 193; *Lister* v. *Turner*, 5 Hare, 281; *Buckle* v. *Mitchell*, 18 Ves. 100; *Daking* v. *Whymper*, 26 Beav. 568; Fry, Sp. Pf. 2nd ed. 72; but see *Fletcher* v. *Ketteman*, 40 L. J. (N.S.) Ch. 624; *Rosher* v. *Williams*, L. R. 20 Eq. 210.

(*z*) *Townend* v. *Toker*, L. R. 1 Ch. 446, 457.

(*a*) *Shine* v. *Gough*, 1 Ball & B. 444. See *Murray* v. *Palmer*, 2 Sch. & Lef. 474, and cases cited in Wh. & Tu. L. C. 6th ed. vol. 1, 209, 210.

creditor or a purchaser. But in cases where the conveyance is actually fraudulent, such reimbursement will not be made (*b*). In America relief is given in similar cases to creditors, subject to the same liability to reimburse a person in possession under a title which is only fraudulent by construction of law (*c*).

Evidence of consideration; of fraud.

* The question as to what evidence of consideration not mentioned in a deed is admissible in support of it as a transaction for value has been already discussed (*d*). So also the question of evidence for or against a sheriff seizing or refusing to seize in spite of a fraudulent assignment or process of law has been dealt with (*e*). [* 515]

Schedule filed in insolvency.

A schedule of debts filed by the settlor in his subsequent insolvency is, of course, evidence as against *him* of those debts, but is not evidence against the settlees, and therefore not sufficient to support a decree setting aside the settlement (*f*).

Evidence of debts under 13 Eliz. c. 5.

The question what is evidence of a debt *at the time* a settlement is executed is somewhat different from the question who is a creditor so as to be entitled to impeach that settlement under 13 Eliz. c. 5.

For, it must be borne in mind that, although a particular creditor may not be able to impeach the settlement; still, if it be set aside at the instance of another creditor, the property comprised in it at once becomes assets for *all* the settlor's creditors, and not merely for the particular creditor who successfully impeached it (*g*). So, Lord Cottenham said in *Skarf* v. *Soulby* (*h*) that in order to take any benefit from having been creditors at the date of the deed, the plaintiffs must allege a debt owing to them at that time. They may, however, take any benefit which may accrue to them from the fact of the settlor having been at that time indebted to others.

It is not necessary that the settlor's liabilities at the

(*b*) *Kenney* v. *Browne*, 3 Ridg. 518; *Stratton* v. *Murphy*, 1 Ir. R. Eq. 361.
(*c*) Bump. Fr. Conv. (Amer.), 2nd ed, 599, 600.
(*d*) Ante, p. 266. (*e*) Ante, pp. 174 et seq.
(*f*) *Townsend* v. *Westcott*, 2 Beav. 340, 345, S. C. 4 Beav. 58; *Barling* v. *Bishopp*, 29 Beav. 417, 421.
(*g*) Ante, pt. i. ch. iii.; post, p. 518.
(*h*) 1 Mac. & G. 373–4.

time of the execution of the settlement should have then actually ripened into debts in order to avoid it (*i*). The way in which a settlor's liabilities and assets should be estimated has been already discussed (*k*).

Burden of proof in general on creditor.

It is a general principle of law that fraud is not to be presumed. The burden of proof of debts sufficient to avoid a settlement therefore rests, in general, upon [* 516] the person or persons who seek to * impeach it. So, where a settlement is impeached on the ground of an intent to defeat *future* creditors, the burden of proof lies on those who impeach it (*l*).

To this rule, that the burden of proof rests on those who seek to impeach the settlement, there are two exceptions.

The first exception is where the settlor can be shewn to have executed the settlement with a fraudulent intent (*m*). In this case it is not necessary to prove the existence of any debt at the time the settlement was executed; for fraud of itself avoids the settlement (*n*).

The second is, where the settlor becomes insolvent shortly after the execution of the settlement, and not in consequence of any wholly unexpected loss which could not reasonably have been reckoned on (*o*).

So, if a man on the eve of going into trade makes a voluntary settlement of the whole or the bulk of his property and becomes insolvent shortly afterwards, the burden of proof lies on him to shew that he was *then* in a position to make that settlement (*p*).

When inquiries directed as to settlor's debts.

A creditor whose debt is subsequent to the settlement and who brings an action in order to prove antecedent debts, with no evidence of such debts (except mortgages), will not be entitled to an inquiry as to the

(*i*) Ante, pp. 50, 57.
(*k*) *In re Ridler*. 22 Ch. D. 74; ante, pp. 57 et seq.
(*l*) *Richardson* v. *Smallwood*, Jac. 552; *Ex parte Mercer*, 17 Q. B. D. 290.
(*m*) *In re Pearson*, 3 Ch. D. 807; ante, p. 68.
(*n*) Ante, pp. 41, 67.
(*o*) *Townsend* v. *Westacott*, 2 Beav. 360, S. C. 4 Beav. 58; *Crossley* v. *Elworthy*, L. R. 12 Eq. 165; *Mackay* v. *Douglas*, L. R. 14 Eq. 106; *Ex parte Russell*, 19 Ch. D. 588.
(*p*) *Crossley* v. *Elworthy*, L. R. 12 Eq. 165; *Mackay* v. *Douglas*, L. R. 14 Eq. 106; ante, pp. 51 et seq. 65.

state of the settlor's circumstances at the time of the settlement (*q*).

Inquiries will, however, be directed where debts are proved, even by a document which is not evidence, as against those claiming under the settlement (*r*). But when debts not properly in evidence.

If there is proof of one prior debt (*s*), or if there is some evidence of the settlor having been in embarrassed circumstances * at the time the settlement [* 517] was executed (*t*), as in the case of *Norcutt* v. *Dodd* (*u*), where there then were three executions in the house of the settlor, it is sufficient foundation for an inquiry to ascertain the amount of the settlor's debts and liabilities and the value of his property at the date of the settlement. And if it appears that at that time his liabilities exceeded his assets (excluding the settled property) the settlement will be set aside (*v*). If proof of one debt, or some embarrassment.

Where it appeared that at the time of making a voluntary settlement the settlor had competent private means, but the evidence shewed that the affairs of a firm in which he had long before become a partner were much embarrassed, and less than a year afterwards became bankrupt, it was held that the settlement was void under 13 Eliz. c. 5; but (there being some slight doubt as to the amount and value of the assets when the settlement was made) an inquiry was allowed the volunteers at their own risk (*w*). Inquiry at volunteers' risk.

But a mere allegation in the statement of claim, that debts owing at the date of the settlement are still unpaid, is not enough (*x*); and where there was only one debt of small amount, and that not clearly proved, and no circumstances to induce the Court to suspect that the settlor was at that time largely indebted, no inquiry No inquiry allowed when.

(*q*) *Lush* v. *Wilkinson*, 5 Ves. 384; *Holloway* v. *Millard*, 1 Mad. 414, 421.

(*r*) *Townsend* v. *Westacott*, 2 Beav. 340, S. C. 4 Beav. 58.

(*s*) *Richardson* v. *Smallwood*, Jac. 554; *Skarf* v. *Soulby*, 1 Mac. & G. 364; *Jenkyn* v. *Vaughan*, 3 Drew. 419, 420; ante pp. 39, 50, 51.

(*t*) *Christy* v. *Courtenay*, 13 Beav. 96; and see *Taylor* v. *Coenen* 1 Ch. D. 636.

(*u*) 1 Cr. & P. 100.

(*v*) *Christy* v. *Courtenay*, 26 Beav. 140; *Townsend* v. *Westacott*, 2 Beav. 340, S. C. 4 Beav. 58; ante, p. 57.

(*w*) *Denison* v. *Tattersall*, 18 L. T. (N.S.) 303.

(*x*) *Lush* v. *Wilkinson*, 5 Ves. 384; *Manders* v. *Manders*, 4 Ir. Eq. 434.

was allowed (*y*). So, the mere fact of a man conveying a large part of his property on trust for sale does not afford a presumption that he was then indebted, and when there is no suggestion in the action that the settlor was indebted when he executed the settlement no inquiry will be allowed (*z*).

The principle is, that where the creditors have the opportunity of proving, and do not prove, the existence of debts *at the time* the settlement is executed, the action must be dismissed (*a*).

Settlement, of which plaintiff ignorant, coming out in the action.

[*518] *But it seems that where the action is not brought for the express purpose of affecting the settlement a different rule applies. Thus, in *Kidney* v. *Coussmaker* (*b*), where the suit was instituted in ignorance of the settlement, which came out in the answer, Sir W. Grant, M.R., directed inquiries, making the following distinction (*c*): "It is said, as the creditors have not proved that the testator was indebted at the date of the settlement, that is not, now to be made a subject of inquiry. The case of *Lush* v. *Wilkinson* (*d*), cited in support of that proposition, does not resemble this case. In that case the bill was filed for the express purpose of affecting the settlement, upon the ground that the settlor was insolvent at the time it was made. There was no evidence in support of the bill, and there was evidence to the contrary produced by the widow. The only reason for surprise, therefore, is that Lord Alvanley did not absolutely dismiss the bill, instead of giving liberty to file another. But in this instance the creditor, not apprised of the settlement, filed the bill to affect all the devisees; and this settlement came out in the answer, which led to inquiry" (*e*).

Inquiry directed though no proof of debt.

Inquiry as to consideration.

In some cases inquiry will be directed as to the consideration for a settlement which is apparently voluntary (*f*).

Who may bring an action under 13 Eliz. c. 4.

As a general rule, any person who is entitled to rank as a creditor may bring an action to avoid a settlement under 13 Eliz. c. 5 (*g*).

(*y*) *Manders* v. *Manders*, 4 Ir. Eq. 434; ante, p. 50.
(*z*) *Battersbee* v. *Farrington*, 1 Sw. 186.
(*a*) *Manders* v. *Manders*, 4 Ir. Eq. 438.
(*b*) 12 Ves. 136. (*c*) 12 Ves. 155. (*d*) 5 Ves. 384.
(*e*) See *Gooch's Case*, 5 Rep. 60 a; ante, p. 166.
(*f*) *Hunt* v. *Maunsell*, 1 Dow, 211; ante, pp. 266 et seq.
(*g*) As to who are creditors, see ante, pt. ii. ch. ii., ch. iii.

A creditor whose debt is contracted *subsequently* to the date of the settlement is in certain cases entitled to impeach it.

When *subsequent* creditor can impeach settlement.

The only reason that a subsequent creditor is allowed to maintain such an action *merely* on the ground of the settlor's indebtedness, is that, if a prior creditor set aside the settlement, a subsequent creditor would be entitled to participate, *pro rata*, so that he has an equity to participate, and may bring his action to enforce that equity (*h*).

* But, as his equity cannot possibly be a bet- [* 519] ter one than that of a creditor whose debt was contracted before the date of the settlement, so if that antecedent creditor cannot impeach such settlement, neither can the subsequent creditor impeach it *merely* on account of the settlor's indebtedness to him (*i*).

A subsequent creditor can maintain an action to set aside a settlement merely on the ground that it was voluntary and that the settlor was then indebted, so long as any debt due at the date of the settlement remains still unpaid at the time of the issue of the writ.

Subsequent creditors may when any prior debt unpaid.

This was expressly decided in the case of *Jenkyn* v. *Vaughan* (*k*). Sir R. T. Kindersley then said (*l*): "In cases where a subsequent creditor files a bill it occurs to me that much may depend on this (supposing there is no evidence of anything to shew the fraudulent intention but the fact of the settlor being indebted to some extent),—whether at the time of filing the bill any of the debts remain due which were due when the deed was executed. In such a case, as any of the prior creditors might file a bill, it appears to me that a subsequent creditor might do so too. When we look at the authorities, we find that in two or three cases where the question has been raised as to the plaintiff's right to file a bill, being a subsequent creditor, and debts antecedent have been shewn still to subsist, the Court,

(*h*) *Jenkyn* v. *Vaughan*, 3 Drew. at p. 425; and see *Chamley* v. *Dunsany*, 2 Sch. & Lef. 714; Story, Eq. Jur. 12th ed. s. 361; ante, p. 61.

(*i*) *Holloway* v. *Millard*, 1 Mad. 119; *Walker* v. *Burrows*, 1 Atk. 94; *Ede* v. *Knowle*, 2 Y. & C. C. C. 172, 178; *Smith* v. *Tatton*, 6 L. R. Ir. 32; Story, Eq. Jur. 12th ed. s. 360; Bump. Fr. Conv. (Amer.), 2d ed. 312, 314, 317; ante, p. 61.

(*k*) 3 Drew, 413.

(*l*) 3 Drew, 425.

having its attention drawn to that, has made a decree in favour of the creditor" (*m*).

This decision has been followed in *Freeman* v. *Pope* (*n*). Sir W. M. James, V. C., there said that *Jenkyn* v. *Vaughan* (*o*) decided that, if there be at the time of filing the bill an unpaid creditor whose debt is prior to the settlement, a subsequent creditor has exactly the [* 520] same right to file a bill as the prior * creditor has; that is to say, the case is to be tried as if the prior and not the subsequent creditor were the plaintiff.

Can subsequent creditor maintain action if *all* prior creditors are paid?

The point has never been expressly decided whether, if all the debts due at the date of the settlement are paid before the writ in the action is issued, a subsequent creditor can maintain that action to set aside the settlement simply on the ground that the settlement was voluntary, and that the settlor was then indebted (*p*). It is conceived that, in the absence of any fraudulent contrivance on the part of the settlor to pay off the existing creditors by creating fresh ones (*q*), such action could not be maintained, because the equity of the subsequent creditor cannot be a higher one than that of a creditor at the date of the settlement.

Settlement when good against subsequent creditors.

Of course a settlement made by a man not then indebted and not meaning a fraud is good against subsequent creditors (*r*); as is a settlement made by a man not then indebted and not in contemplation of going into trade, even though the settlor should some years afterwards, by a totally new arrangement, go into trade (*s*).

As the question, whether a settlement is valid or void

(*m*) See *Skarf* v. *Soulby*, 1 Mac. & G. 373; *Richardson* v. *Smallwood*, Jac. 552.

(*n*) L. R. 9 Eq. 206, S. C. L. R. 5 Ch. 538, 540; ante p. 47; *Crossley* v. *Elworthy*, L. R. 12 Eq. 158; *Taylor* v. *Coenen*, 1 Ch. D. 636.

(*o*) 3 Drew, 413.

(*p*) *Lush* v. *Wilkinson*, 5 Ves. 384; *Jenkyn* v. *Vaughan* 3 Drew, 425; but see *Smith* v. *Tatton*, 6 L. R. Ir. 32; ante pp. 64 et seq.

(*q*) *Richardson* v. *Smallwood*, Jac. 552; *Holmes* v. *Penney*, 3 K. & J. 99; *Smith* v. *Tatton*, 6 L. R. Ir. 32; and see Bump. Fr. Conv. (Amer.), 2d ed. 315, 316. This has been so held in Upper Canada, *Collard* v. *Bennett*, 28 Chy. 556.

(*r*) *Holloway* v. *Millard*, 1 Mad. 420, 421; ante p. 75.

(*s*) *Mackay* v. *Douglas*, L. R. 14 Eq., per Malins, V.C., at p. 121; Story, Eq. Jur. 12th ed. s. 358; see Bump. Fr. Conv. (Amer.), 2d ed. 309, 310.

against creditors, is determined upon consideration of all the circumstances at the time it is executed, so it is plain that, if the settlor was not then indebted, no subsequent creditor can impeach it *merely* on the ground of the settlor's subsequent indebtedness to him (*s*).

When no debt due at date of settlement and *subsequent* creditor can impeach deed.

A subsequent creditor may, however, impeach a settlement without having to prove at least one debt due at the date of the settlement and still unpaid at the time of the issue of his writ in any of the following cases :—

1. If it can be shewn that the settlement was made with * express intent to "delay, hinder, or de- [* 521] fraud" *future* creditors (*t*) ; as when, soon after its execution, the settlor denudes himself of all his remaining property, or the property left out of settlement cannot be realized when required (*u*).

2. If such settlement is made by a man about to engage in trade, or any hazardous operation, in contemplation of possible *future* indebtedness, with the whole or the bulk of his property (*v*): and even if the settlor had paid all debts due from him at the date of the settlement (*w*), or owed no debts whatever at that date (*x*).

3. If such settlement must necessarily defeat the subsequent creditor in an action then pending, and was voluntary (*y*).

Subsequent creditor cannot impeach settlement for value *if* then no debts.

There appears to be no case in which a subsequent creditor has succeeded in impeaching a settlement for

(*s*) See *Sedgwick* v. *Place*. 25 L. T. (N.S.) (Amer.) 307 ; Bump. Fr. Conv. (Amer.), 2nd ed. 310 ; so too in Upper Canada, *Boustead* v. *Shaw*, 27 Chy. 280.

(*t*) *Murphy* v. *Abraham*, 15 Ir. Ch. Rep. 371 ; *Ware* v. *Gardner*, L. R. 7 Eq. 317 ; *Re Clint*, L. R. 17 Eq. 115 ; *In re Pearson*, 3 Ch. D. 807 ; *Smith* v. *Tatton*, 6 L. R. Ir. 32 ; see Bump. Fr. Conv. (Amer.), 2d ed. 308 ; Story, Eq. Jur. 12th ed. s. 361 ; ante, pp. 67, 68.

(*u*) *Spirett* v. *Willows*. 3 D. J. & S. 293 ; *Freeman* v. *Pope*, L. R. 5 Ch. 541, 544, ante, p. 66 ; *Crossley* v. *Elworthy*, L. R. 12 Eq. 158, *Ex parte Russell*, 19 Ch. D. 588 ; but see *Smith* v. *Tatton*, 6 L. R. Ir. 32.

(*v*) *Mackay* v. *Douglas*, L. R. 14 Eq. 106; *Ex parte Russell*, 19 Ch. D. 588; and see Bump. Fr. Conv. (Amer.), 2nd ed. 310, 311; *Reade* v. *Livingstone* (Amer.), 3 Johns. Ch. 497, 501.

(*w*) *Mackay* v. *Douglas*, L. R. 14 Eq. 106, 113.

(*x*) *In re Pearson*, 3 Ch. D. 807.

(*y*) *Barling* v. *Bishopp*, 29 Beav. 417; *Ex parte Mercer*, 17 Q. B. D. 290; ante, p. 74.

valuable consideration, on the ground of not being made bonâ fide, when there were no debts in existence at the date of the settlement (*z*).

But not if his action would defeat the prior creditors.

Of course, a creditor whose debt is contracted subsequently to the date of the settlement must not have an interest adverse to that of the prior creditors, for he cannot maintain an action which would, if successful, support his claim at their expense; and a judgement will not be made in his favour unless the effect of it would be to benefit the prior creditors equally by letting in their claims on the settled property (*a*). The reason of this is, that the right of a subsequent creditor to maintain such an action at all, on the ground of the settlor's indebtedness, depends on that of the creditors at the date of the settlement (*b*).

Action against debtor living and not bankrupt.

[* 522] * An action can be maintained under 13 Eliz. c. 5, by a creditor against his debtor, though that debtor is living and neither insolvent nor bankrupt, to set aside a settlement made by him (*c*); for that statute is quite distinct from the bankrupt law for the time being in force, and is not affected by it (*d*).

But such action cannot be maintained if the creditor is or becomes a debtor to the settlor on a balance of account (*e*).

Trustee of bankrupt must bring action.

When the settlor is a bankrupt at the date of the issue of the writ, the trustee under his bankruptcy (*f*), or the inspector under the deed of inspectorship (*g*), is the proper person to bring the action.

A bankrupt is not a proper party to an action by the trustee under his bankruptcy to set aside a settlement made by him (*h*).

The question, whether proceedings to avoid a settle-

(*z*) *Smith* v. *Tatlon*, 6 L. R. Ir. at page 43; ante, pp. 84 et seq.
(*a*) *Collins* v. *Burton*, 4 De G. & J. 612.
(*b*) Ante, p. 61.
(*c*) *Reese River Silver Mining Co.* v. *Atwell*, L. R. 7 Eq. 347; *Cornish* v. *Clark*, L. R. 14, Eq. 184; *In re Johnson*, 20 Ch. D. 388, S. C. 51 L. J. (N.S.) Ch. 503; *Ex parte Eyre*, 44 L. T. (N.S.) 922.
(*d*) Ante, pp. 10, 96. (*e*) *White* v. *Witt*, 24 W. R. 727.
(*f*) *Doe* v. *Ball* 11 M. & W. 531; *Pott* v. *Todhunter*, 2 Coll. 76; *Ware* v. *Gardner*, L. R. 7 Eq. 317; *Kent* v. *Riley*, L. R. 14 Eq. 190; *Kevan* v. *Crawford*, 6. Ch. D. 29.
(*g*) *Mackay* v. *Douglas*, L. R. 14, Eq. 106.
(*h*) *Weise* v. *Wardle*, L. R. 19 Eq. 171.

ment under 13 Eliz. c. 5, should be taken by the trustee under the settlor's bankruptcy in the Chancery Division of the High Court of Justice or in the Court of Bankruptcy (*h*), is one on which there has been some conflict of decisions.

In what Court must trustee in bankruptcy impeach settlement?

Before the Bankruptcy Act, 1869, although it had been laid down that the Insolvent Court was the proper tribunal (*i*), still there were many cases in which a bill had been sustained in Chancery after the settlor's bankruptcy by his assignees (*k*). It was their duty to endeavor to increase the estate for the benefit of creditors, and to inquire into any family transaction, especially between husband and wife, which was liable to most suspicion (*l*); and, where an official assignee filed his bill before he had been formally appointed assignee of the bankruptcy, it was held that he had an inchoate right before the bill filed, that * it was perfected [* 523] before the hearing, and that the Court would not listen to an objection so purely technical (*m*).

Under section 72 of the Bankruptcy Act, 1869, the jurisdiction conferred on the Court of Bankruptcy was concurrent and not exclusive, discretionary and not to be invoked as of right (*n*). With regard to the exercise of this judicial discretion, James, L.J., in *Ex parte Brown* (*o*), laid down the general principle that, when a deed is impugned on the ground that it is void by the operation of the bankruptcy law, not on a ground which could have been available to the bankrupt himself, the case is pre-eminently one which the Court of Bankruptcy ought to decide itself, and not to leave to the ordinary tribunal (*o*). In such cases as those under 13 Eliz. c. 5, the trustee claims by a higher and better title than the bankrupt himself, as he is a party to the fraud, and therefore cannot himself avoid them (*p*).

This general principle has been followed with a

(*h*) See now the Bankruptcy Act, 1883 (46 &47 Vict. c. 52), ss. 92, 93.

(*i*) See *Heath* v. *Chadwick*. 2 Ph. 649.

(*k*) See *Thompson* v. *Webster*, 4 Drew. 628; *Ware* v. *Gardner*, L. R. 7 Eq. 317; et supra.

(*l*) Per Lord Hardwicke in *Ward* v. *Shallet*, 2 Ves. 17.

(*m*) *Carrick* v. *Ford*, L. R. 4 Ch. 247, 251.

(*n*) *In re Lowenthal*, 13 Q. B. D., per Cave, J., 241; *Ex parte Reynolds*, 15 Q. B. D., per Brett, L.J., 190.

(*o*) 11 Ch. D. 148; and see *Ex parte Armitage*, 17 Ch. D. 13.

(*p*) *Ex parte Butters*, 14 Ch. D., per James, L.J., 267; *Ex parte Armitage*, 17 Ch. D. 13.

qualification in cases where deeds were impugned under 13 Eliz. c. 5, in County Courts (*q*). The qualification was that, if either the amount at stake was beyond the ordinary jurisdiction of the County Court, or if serious questions of personal character were involved, the judge ought to decline to try the case, and leave it to be tried by action in the High Court of Justice (*q*).

It has been held that the jurisdiction conferred on the High Court in bankruptcy (*r*) by section 102 of the Bankruptcy Act of 1883 (*s*) is exactly the same as that which was conferred on the old Court of Bankruptcy by the corresponding section 72 of the Bankruptcy Act of 1869 (*t*), so far at least as relates to proceedings in bankruptcy in the High Court. The exercise of the jurisdiction in County Courts is restricted by a pro- [* 524] *vision (*u*) that any claim not arising out of the bankruptcy which might have been enforced by action in the High Court shall not be tried in the County Court unless either all the parties consent, or, in the opinion of the judge, the value of the money, money's worth, or right in dispute is not over £200.

In general in Bankruptcy Court.

The true rule seems now to be that the trustee ought in general to take proceedings in bankruptcy to avoid a settlement unless there are special circumstances which render it expedient to have the case tried by action in the High Court. If the question is one for a County Court, it should only be tried by action in the High Court, if within the provisions above stated (*u*).

Where the settlor becomes bankrupt during the course of the action, it seems that this is no bar to the plaintiffs continuing that action (*v*).

Is a corporation within 13 Eliz. c. 5?

There appears to be no express decision upon the point whether a corporation is within 13 Eliz. c. 5, so as to be able to avoid a settlement as fraudulent.

(*q*) *Ex parte Armitage*, 17 Ch. D. 13; *Ex parte Price*, 21 Ch. D. 553.

(*r*) See 46 & 47 Vict. c. 52, ss. 92, 93, and Bankruptcy Rules, 1883, 5 (E). The Act of 1883 repeals the Act of 1869; see section 169 and schedule 5.

(*s*) *In re Lowenthal*, 13 Q. B. D. 238.

(*t*) 32 & 33 Vict. c. 71.

(*u*) 46 & 47 Vict. c. 52, s. 102 (1); ante, p. 523.

(*v*) *Goldsmith* v. *Russell*, 5 De. G. M. & G. 547, 553; *Crossley* v. *Elworthy*, L. R. 12 Eq. 158; *Tunqueray* v. *Bowles*, L. R. 14 Eq. 151; and see R. S. C. (1883) Ord. 17.

The preamble of that statute shews that it was meant to extend to "creditors and others" (*w*); and in law a corporation may, of course, be a creditor. By the operative part of that statute (*x*), every conveyance is avoided only as against "that *person or persons*, his or their heirs, successors, executors, administrators, and assigns, and every of them," whose rights or remedies are thereby interfered with: But the statute does not extend to a conveyance made upon good consideration and bonâ fide to "any person or persons, or bodies politic or corporate," not having then notice of any fraud (*y*).

It is conceived that a corporation is within the statute so as to be able to avoid a settlement as fraudulent, because both the context of the section (*z*) and the general object of the statute * seem to re- [* 525] quire the word *person* to have its more extended sense (*a*).

Or company? It seems to have been assumed in *In re Maddever* (*b*), where the point was not argued, that a company is a creditor within this statute; the same arguments apply both to a corporation and to a company.

Or liquidator of unregistered company? It is also an undecided point whether the liquidator of an unregistered (*c*) company is within this statute; it is conceived that, as he is in the position of a trustee for the creditors of the company of the property belonging to the company at the date of the winding up, he would probably be held within it (*d*).

Action not maintainable by executor or administrator of deceased settlor, Where (*e*) the bill was filed after the settlor's death it has been argued that the executors, and not the creditors, ought to file the bill, on the principle that the creditors of A. cannot maintain a bill against the pos-

(*w*) Appendix No. I.
(*x*) Section 2; ante, pp. 64, 163.
(*y*) Section 6; ante, pp. 78 et seq.
(*z*) See the use of the word "successors," section 1.
(*a*) 2 Inst. 722; Maxwell, Stat. 292; *Pharmaceutical Society* v. *London and Provincial Supply Association*, 5 App. Cas. 857; and see Bump. Fr. Conv. (Amer.), 2nd ed. 494.
(*b*) 27 Ch. D. 523.
(*c*) Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 203, 204.
(*d*) *In re Marine Mansions Co.*, L. R. 4 Eq. 601, 610; *Waterhouse* v. *Jamieson*, L. R. 2 Sc. H. L. at p. 38; *Black & Co.'s Case*, L. R. 8 Ch. 262.
(*e*) *Lush* v. *Wilkinson*, 5 Ves. 384.

sessors of assets of B. in which A. is interested (*f*). This is clearly not so (*g*), for it is only as against creditors that property fraudulently settled is general assets (*h*); and settlor's executor or administrator does not represent the settlor's creditors, but the settlor, and against him and his representatives the settlement is binding (*i*). The same principle applies to the case of the committee of a settlor who has become a lunatic (*k*).

or committee of lunatic.

Actions on behalf of self and all other creditors. When settlor is alive.

If the settlor is alive, and not a bankrupt, at the time the action is brought, it should be by a creditor or creditors on behalf of himself or themselves and all other the creditors of the settlor (*l*).

When settlor is dead.

If the settlor is dead at the time the action is [* 526] brought, * it should be by one or more creditors on behalf of himself or themselves and all other the creditors of the deceased settlor for administration of his estate (*m*).

If such administration action is not brought by a creditor who seeks to set aside a settlement made by the deceased settlor, any creditor who impeaches such settlement may do so in that action by taking out a summons (*n*), or by obtaining leave to attend the proceedings under the judgment; and may have inquiries made as to such settlement (*o*).

Whether by originating summons.

It does not appear to have been yet decided whether a creditor of a deceased settlor can impeach a settlement of that settlor by an *originating* summons (*p*).

(*f*) *Elmslie* v. *McAulay*, 3 Bro. C. C. 624.

(*g*) *Hawes* v. *Leader*, Cro. Jac. 270; *Lush* v. *Wilkinson*, 5 Ves. 384; *In re Maddever*, 27 Ch. D. 523.

(*h*) See pp. 69, 70.

(*i*) See pp. 463, 464 et seq.

(*k*) *Colman* v. *Croker*, 1 Ves. Jun. 160.

(*l*) *Goldsmith* v. *Russell*, 5 De G. M. & G. 547; *Crossley* v. *Elworthy*, L. R. 12 Eq. 163; *Mackay* v. *Douglas*, L. R. 14 Eq. 106; *Cornish* v. *Clark*, L. R. 14 Eq. 184; *In re Johnson*, 20 Ch. D. 389, S. C. 51 L. J. (N.S.) Ch. 503; R. S. C. Ord. 16, r. 9.

(*m*) *Adames* v. *Hallett*, L. R. 6 Eq. 473; *Taylor* v. *Coenen*, 1 Ch. D. 636; *Middleton* v. *Pollock*, 2 Ch. D. 104; *In re Maddever*, 27 Ch. D. 523.

(*n*) *Middleton* v. *Pollock*, 2 Ch. D. 104; *In re Ridler*, 22 Ch. D. 74.

(*o*) R. S. C. Ord. 55, rr. 3 (a), (g), 10.

(*p*) *Middleton* v. *Pollock*, 2 Ch. D. 104; *In re Ridler*, 22 Ch. D. 74; R. S. C. Ord. 55, rr. 3, 5 B., 6; and see *Re Berkeley*, L. R. 19 Eq. 467.

The question whether the settlement is valid or void, it will be observed, is primarily a question between the creditor, the trustees of the settlement, and the parties interested thereunder; and not between the creditor and the executors or administrators of that settlor, as seems contemplated by the order.

It is conceived, however, that a creditor may so impeach such settlement, as under the Judicature Acts he might have done, by a summons in an administration action (*q*). Of course the creditor's summons must be on behalf of himself and all other the creditors of the settlor, as in an ordinary action (*q*).

This rule appears now to apply even if the plaintiff has a judgment or lien on the property comprised in the deed (*r*), or if the deed is impeached as executed in order to defeat the plaintiff's particular debt (*s*). The Judicature Act, 1875, has not effected the right of a judgment creditor to priority of payment out of the assets of an insolvent settlor deceased (*t*).

*A creditor by elegit could before the Judica- [*527] ture Acts sue in equity and set aside a deed fraudulent against creditors, although he could have recovered at law (*u*), and although there was sufficient to pay him aliunde, and he would not have been delayed by an inquiry to that effect (*v*).

Plaintiff creditor *and* purchaser.

It seems that a plaintiff is not prevented from maintaining an action as a creditor because he has an equitable mortgage by deposit of title deeds and memorandum of agreement, and also brings such action as a purchaser under 27 Eliz. c. 4 (*w*).

It has been said by Lord Thurlow, in *Coleman* v. *Croker* (*x*), that in order to take advantage of the stat-

(*q*) Daniel, 6th ed. 991; ante, p. 525.
(*r*) *Goldsmith* v. *Russell*, 5 De G. M. & G. 547; *Jenkyn* v. *Vaughan*, 3 Drew. 419; *Rees River Silver Mining Co.* v. *Atwell*, L. R. 7 Eq. 347; *Cornish* v. *Clark*, L. R. 14 Eq. 184.
(*s*) *Blenkinsopp* v. *Blenkinsopp*, 1 De G. M. & G. 495; *Adames* v. *Hallett*, L. R. 6 Eq. 468, 473; ante, p. 72.
(*t*) Section 10; *Smith* v. *Morgan*, 5 C. P. D. 337; *In re Maggi*, 20 Ch. D. 345; Seton, 4th ed. 815–817.
(*u*) *Bennett* v. *Musgrove*, 2 Ves. 51; see now R. S. C. Ord. 43; Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 146.
(*v*) *Chamley* v. *Dunsany*, (in H. of L.), 2 Sch. & Lef. 714.
(*w*) *Lister* v. *Turner*, 5 Hare, 281; see post, p. 549.
(*x*) 1 Ves. Jun. 160; see *Collins* v. *Burton*, 4 De G. & J. 612; *Wiggins* v. *Armstrong*, 2 Johns. Ch. Ca. 144.

Creditor need not now have judgment or any lien on his debt.

ute 13 Eliz. c. 5, a creditor must put himself in a situation to complain by getting judgment at law for his debt. This has, however, since been decided, before the operation of the Judicature Act, 1873 (*y*), to be unnecessary; and a creditor must now simply prove his debt, of which, of course, a judgment is proof, in order to entitle himself to proceed under this statute.

So, too, a creditor need not now obtain a charging order (*z*) on shares or stock comprised in the deed, or a garnishee order on debts, or any lien on the property therein, nor need leasehold property be delivered in execution, in order to entitle such creditor to take proceedings under 13 Eliz. c. 5 (*a*).

Cross-bill in foreclosure suit impeaching settlement of surplus *if any*.

A voluntary settlement could not be impeached as void against creditors by a cross-bill filed in a foreclosure suit in which the original bill prayed that the surplus of the sale of the property, after satisfying the mortgage, might be invested upon the trusts of the voluntary settlement. Such a prayer did not give the creditors a right to file the cross-bill, which was in the [*528] *nature of a defence to the original bill; for non constat that there ever would be a surplus; and, if there were, he who claimed it against the settlement was before the Court, and he should have waited till the existence of the surplus was ascertained. Until then it was a purely speculative bill, putting the volunteers to support a settlement when non constat they would ever derive any benefit from it (*b*).

Court merely sets deed aside.

The general principle on which the Court acts with regard to the remedy it gives to creditors under 13 Eliz. c. 5, in such an action, is simply to declare the settlement fraudulent and void as against the creditors(*c*).

It leaves the creditors to take such other proceedings as may be necessary to enforce their rights against the property the subject of the settlement.

(*y*) Section 24; *Goldsmith* v. *Russell*, 5 De G. M. & G. 547; *Reese River Silver Mining Co.* v. *Atwell*, L. R. 7 Eq. 350, 352.

(*z*) See Seton, 4th ed. 305 et seq.; R. S. C. Ord. 46.

(*a*) 27 & 28 Vict. c. 112; see Seton, 4th ed. 1141–1145; *Reese River Silver Mining Co.* v. *Atwell*, L. R. 7 Eq. 347, 352.

(*b*) *Manders* v. *Manders*, 4 Ir. Eq. 434, 440; *Hoderness* v. *Rankin*, 6 Jur. (N.S.) 928, S. C. affirmed 903; and see now Jud. Act, 1873, s. 24 (3), and R. S. C. Ord. 19, r. 3.

(*c*) *Cornish* v. *Clark*, L. R. 14 Eq. 184; *Taylor* v. *Coenen*, 1 Ch. D. at p. 642.

So Lord Hardwicke said (*d*): "I do not know, in the case of fraudulent conveyances, that this Court has ever done anything more than remove such fraudulent conveyances out of the way; nor any instance of a decree for sale; but equity follows the law, and leaves them to their remedy by elegit without interfering one way or the other."

This decision has been followed in *Reese River Silver Mining Co.* v. *Atwell;* it was there laid down that all the Court does is to set the deed aside, and leave the creditors to take some independent proceedings if they wish to have execution against the property comprised in the deed (*e*).

How far such settlement is void.

A settlement impeached by creditors under 13 Eliz. c. 5, is only declared void as against creditors. For every other purpose it is good; or, if the claims of creditors are satisfied, the surplus is bound by the trusts of the settlement (*f*).

*So a settlement impeached by a subsequent [*529] purchaser under 27 Eliz. c. 4, is only declared void as against that purchaser; the settlement is only avoided to the extent of that purchaser's interest (*g*).

Profits received *pendente lite* whether decreed back.

So, to, Lord Hardwicke, in *Higgins* v. *York Buildings Co.* (*h*), refused to order an account of profits received by the voluntary settlor or his grantees since the filing of the bill; but see *Blenkinsopp* v. *Blenkinsopp* (*i*), where such an order was made against the trustees of the settlement.

Same as to 27 Eliz. c. 4.

In the same way as to deeds which are fraudulent under the statute 27 Eliz. c. 4, the Court simply declares them void as against the subsequent purchaser, and leaves both parties to their legal rights and remedies.

Cancellation.

It has never been held that a purchaser could come

(*d*) *Higgins* v. *York Buildings Co.*, 2 Atk. 107.
(*e*) L. R. 7 Eq. 347; *Cornish* v. *Clark*, L. R. 14 Eq. 184; Seton, 4th ed. 1369–1371.
(*f*) *Cornish* v. *Clark*, L. R. 14 Eq. 184; *Tunqueray* v. *Bowles*, L. R. 14 Eq. at p. 157; *Taylor* v. *Coenen*, 1 Ch. D. 636; *In re Maddever*, 27 Ch. D. at p. 529; ante, pp. 68, 69, 463, 464.
(*g*) *Dolphin* v. *Aylward*, L. R. 4 H. L. 499, 500; *In re Walhampton Estate*, 26 Ch. D. 393; ante, pp. 208, 464.
(*h*) 2 Atk. 107.
(*i*) 12 Beav. 568, S. C. 1 De G. M. & G. 469.

into a Court of equity to have a voluntary deed delivered up to be cancelled (*k*).

If the action be one for specific performance, the Court declares the voluntary settlement void as against the subsequent purchaser, and makes an ordinary order for specific performance (*l*); and trustees under such settlement will in such a case be directed to convey, or concur in conveying, the property to the purchaser, or as he shall direct (*m*).

13 Eliz. c. 5. Fraudulent deed not delivered up to be cancelled if property passed by it.

Where a deed is declared void against creditors, and the settlor is not a bankrupt, the Court will not order it to be delivered up to be cancelled if any property passed by it, but will direct the trustees or grantees under it to do and concur in all acts necessary for making the property therein comprised available for creditors (*n*). The reason of this is that the grantees are entitled subject to the rights of creditors, and [* 530] *there might be a surplus after paying all the creditors (*o*). And where a deed is set aside by creditors before all the assets are got in, the Court will consider the assets, when realized, as still subject to the settlement, if there be any surplus after meeting all the settlor's liabilities (*p*).

Surplus applicable to uses of settlement.

Deed when cancelled.

Where, however, no property passes or is intended to pass by the deed, or the grantor is bankrupt, the Court will order it to be delivered up to be cancelled, and has full jurisdiction to do so (*q*).

Where a deed between several parties is set aside as void against the creditors of one of them, it will be set aside entirely, if the effect would otherwise be to work an injustice to the other parties to the deed, innocent of the fraud; for, if those other parties were not aware of the fraud on creditors, the state of circumstances on

(*k*) *De Hoghton* v. *Money*, L. R. 1 Eq. 159.

(*l*) *Price* v. *Jenkins*, 4 Ch. D. 485, S. C. 5 Ch. D. 619.

(*m*) *Willatts* v. *Busby*, 5 Beav. 193; *Daking* v. *Whimper*, 26 Beav. 568; Seton, 4th ed. 1374.

(*n*) *Bott* v. *Smith*, 21 Beav. 511, 517; *Reese River Silver Mining Co.* v. *Atwell*, L. R. 7 Eq. 347, 352; *Cornish* v. *Clark*, L. R. 14 Eq, 184; *In re Maddever*, 27 Ch. D. at p. 529.

(*o*) *Burton* v. *Vanheythuysen*, 11 Hare, 134; *Cracknell* v. *Janson*, 11 Ch. D. 14; *Shurmur* v. *Sedgwick*, 24 Ch. D. 597.

(*p*) *French* v. *French*, 6 De G. M. & G. 95, 103; ante, p. 464.

(*q*) *Barling* v. *Bishopp*, 29 Beav. 417, 421; *Tarleton* v. *Liddell*, 17 Q. B. 390. 414, see S. C. in Chancery, 4 De G. & Sm. 540; Seton, 4th ed. 1369.

which they entered into the contract is altered, and they would be wronged by a partial avoidance of the instrument (*r*), and in such a case the Court can order the deed to be cancelled (*s*).

Recovery.

The Court has no power to set aside or reverse a recovery to bar an estate tail because the deed to lead the uses was fraudulent within the statute, for the recovery enures nevertheless to bar the estates of those in remainder (*t*).

Where settlor is an outlaw.

Where a settlor has been outlawed after making a settlement, void against his general creditors, no property passes at law to the Crown (for the settlement is good against the Crown); and there is, therefore, no need for a creditor, before impeaching the settlement, to obtain a conveyance of the legal estate from the Crown, which only takes subject to existing rights (*u*).

Reconveyance when ordered.

As soon as a settlement is declared void against creditors, * it becomes absolutely void as far as [* 531] it is impeached (*v*). Where, therefore, a deed is absolutely set aside for fraud, it is incorrrect to order a reconveyance by the person claiming under it (*w*); but where the estate has been conveyed to a third person, as an instrument, not privy to the fraud, or if the deed is set aside upon paying so much money, then, till payment, the estate remains, and a reconveyance is proper (*x*).

Lis pendens.

It seems doubtful whether registration of an action to set aside a deed appointing real estate to such uses as A. should appoint, and in default to B., as void against creditors of B. as a *lis pendens*, is a sufficient protection to them (*y*).

(*r*) *Tarleton* v. *Liddell*, 17 Q. B. 390; and see *Davidson* v. *Russel*, 2 Dick. 761.

(*s*) *Tarleton* v. *Liddell*, 17 Q. B. 414.

(*t*) *Tarleton* v. *Liddell*, 17 Q. B. 390, 414, see S. C. in Chancery, 4 De G. & Sm. 538, 540.

(*u*) *Goldsmith* v. *Russell*, 5 De G. M. & G. 547–555.

(*v*) See *O'Connor* v. *Bernard*, 2 Jo. (Ir.) 654, 698 et seq.

(*w*) See *Tarleton* v. *Liddell*, 17 Q.B.390,414; *Davidson* v. *Russel*, 2 Dick. 761; *Murray* v. *Mann*, 2 Exch. 538, 541; *Attorney-General* v. *Magdalen College*, 18 Beav. 255; *Smith* v. *Hurst*, 10 Hare, 30; see Seton, 4th ed. 1368, 1371.

(*x*) Per Lord Loughborough in *Bates* v. *Graves*, 2 Ves. 295. See also *Stump* v. *Gaby*, 2 De G. M. & G. 623; *Attorney-General* v. *Magdalen College*, 18 Beav. 223, 255; *Vorley* v. *Cooke*, 1 Giff. 230, 235–7; *Tarleton* v. *Liddell*, 17 Q. B.390, 408.

(*y*) *Beyfus* v. *Bullock*, L. R. 7 Eq. 391.

The exercise of a power of appointment by a debtor in a deed, by which the estate is limited to him in default of appointment by him, in favour of a purchaser for value will be restrained by injunction at the instance of a creditor who impeaches that deed as void against him (*y*).

Concurrent jurisdiction of equity and law on the statutes of Elizabeth.

The Courts of equity have always had jurisdiction in matters of fraud (*a*), and have always exercised a concurrent jurisdiction with the Courts of law on these statutes of Elizabeth on fraudulent conveyances. Equity, in fact, "determined touching charities and frauds long before the making of any statute concerning the same" (*b*), and the principles of decision at law and equity must be taken to be the same (*c*).

A Court of equity, it has long been settled, could decree a deed fraudulent under these statutes without any [* 532] trial at law (*d*); * and even where the conveyance was not to trustees, but direct to the volunteers (*e*), the fraud was as well examinable and triable by an equity judge as by a jury at law, fraud and trusts being almost the only things that this Court formerly took cognizance of (*f*); and even in cases where the settlement could be deemed fraudulent at law, a man might come into equity for the sake of further relief (*g*).

In *Bright* v. *Eynon* (*h*) Lord Mansfield, C.J., said that fraud and covin might in judgment of law avoid every kind of act, and that *what* circumstances and facts amount to such fraud or covin was always a question of law. Courts of equity and Courts of law had a concurrent jurisdiction to suppress and relieve against fraud. But the interposition of the former was often necessary for the better investigating truth and to give more complete redress.

(*a*) See *Sowerby* v. *Warder*, 2 Cox, 268; *Colt* v. *Woollaston*, 2 P. Wms. 154, 156; *Stent* v. *Bailis*, ibid. 220, 3 Bl. Com. 437. 439; *Chesterfield* v. *Janssen*, 2 Ves. 125, 155; *Hill* v. *Lane*, L. R. 11 Eq. 215.

(*b*) *Hungerford* v. *Earle*, 2 Vern. 261–2.

(*c*) *Bates* v. *Graves*, 2 Ves. Jun. 295; *Adames* v, *Hallett*, L. R. 6 Eq. 468; *Russel* v. *Hammond*, 1 Atk. 15; *Hobbs* v. *Hull*, 1 Cox, 445.

(*d*) *White* v. *Hussey*, Prec. Ch. 13-15.

(*e*) *Townend* v. *Toker*, L. R. 1 Ch. 446, 458.

(*f*) *Leukener* v. *Freeman*, Freem. Ch. 236–7; Prec. Ch. 105.

(*g*) *White* v. *Sansom*, 3 Atk. 411; *Bennet* v. *Musgrove*, 2 Ves. 51, 52; *Arundel* v. *Phipps*, 10 Ves. 148.

(*h*) 1 Burr. 395.

As to cases under these statutes where the plaintiff might have recovered at law, Lord Hardwicke laid it down (*i*) that, if it was merely a case of constructive or presumed fraud, equity would leave the purchaser to his remedy at law; but that whenever the conveyance was attended with actual fraud, though he might go to law by ejectment and recover the possession, he might come into a Court of equity to set aside that conveyance. Where remedy could be had at law.

The Chancery Division of the High Court of Justice (*k*) had the following among other business expressly assigned to it by the Judicature Act, 1873 (*l*) :— Under Judicature Acts action usually in Chancery Division.

> The administration of the estates of deceased persons;
>
> The dissolution of partnerships, or the taking of partnership or other accounts;
>
> The redemption or foreclosure of mortgages;
>
> *The rising of portions or other [* 533] charges on land;
>
> The sale or distribution of the proceeds of property subject to any lien or charge;
>
> The executions of trusts, charitable or private;
>
> The rectification, or setting aside, or cancellation of deeds or other written instruments;
>
> The specific performance of contracts between vendors and purchasers of real estate, including contracts for leases.
>
> The partition or sale of real estates.

The three Common Law Divisions had assigned to them all causes and matters pending in the respective Courts at the commencement of the Judicature Act, 1873; and also all causes and matters within their respective *exclusive* cognizance if the Judicature Act, 1873 had not passed (*m*).

(*i*) In *Bennet* v. *Musgrove*, 2 Ves. 51-2. See *Ramshire* v. *Bolton*, L. R. 8 Eq. 294.

(*k*) Judicature Act, 1873, ss. 3, 4, 16, 24, 32; Ord. 16, Dec. 1880; see Wilson, 4th ed. 42-46.

(*l*) Section 34. See *Rogers* v. *Jones*, 7 Ch. D. at p. 399.

(*m*) Judicature Act, 1873 s. 34.

The action must be brought in the Queen's Bench Division, if it was such as formerly would have been within the *exclusive* cognizance of any of the three Common Law Divisions, which are now merged in the Queen's Bench Division.

It is, therefore, conceived that, in general, an action under these statutes should be brought in the Chancery Division (*n*).

In any other case the plaintiff may choose the division in which to bring his action (*o*).

Fraud must be alleged.

And where the action is brought with the express purpose of setting aside a settlement, there must be an allegation in the statement of claim that the settlement was fraudulent (*p*).

Pleading release.

In pleading the release of a claim to a litigated estate as a valuable consideration to support a deed, it is not necessary to shew what was the value or nature of the claim released (*q*).

Creditor taking benefit not estopped.

[*534] *A creditor is not estopped from bringing an action to set aside a deed by taking a benefit under other parts of it which he does not impeach (*r*). A deed may be good in part, and as to part fraudulent and void against purchasers or creditors (*s*), although the creditor attempts to upset the whole transaction (*t*).

Settlement good in part and void in part.

There can be no doubt that some limitations in a settlement may be voluntary and void against creditors or purchasers, while others in the same settlement are on valuable consideration and binding. This is evident

(*n*) Section 34; supra, pp. 522 et seq.

(*o*) Judicature Act, 1873, s. 11; R. S. C. Ord. 5, r. 5.

(*p*) *Richardson* v. *Horton*, 7 Beav. 112; and see *Holderness* v. *Rankin*, 6 Jur. (N.S) 928, S. C. affirmed 903; R. S. C. Ord. 19, rr. 15, 22; *Davy* v. *Garrett*, 7 Ch. D. 473, 489; *Wallingford* v. *Mutual Society*, 5 App. Cas. 685; Kerr, Fraud & Mis. 2nd ed. 425 et seq.

(*q*) *Hill* v. *Bishop of Exter*, 2 Taunt. 69; and see R. S. C. Ord. 19, r. 15.

(*r*) *French* v. *French*, 6 De G. M. & G. 95; *Neale* v. *Day*, 28 L. J. (N.S.) Ch. 45.

(*s*) Style, 428; so also in marriage settlements where the limitations to husband, wife, and issue are good, but remainders to collaterals may be voluntary and void; see ante, pp. 342 et seq.

(*t*) *Russel* v. *Hammond*, 1 Atk. 13, 16, West (t. H.) 530. For form of decree, see *Neale* v. *Day*, 28 L. J. (N.S.) Ch. 47; Seton, 4th ed. 1371.

from the many cases in which it has been decided that limitations to collaterals (unsupported by any consideration besides the marriage) are voluntary, whereas the interests of the husband, wife, and issue are supported by a high and valuable consideration (*u*).

As between the parties themselves, the Court may sometimes be influenced by the fact that, as to some persons interested, the deed was a contract for value, and will on that ground, not liking to garble and split agreements, as "agreements are entire, and the several branches might have been in view" (*v*), order specific performance of (for instance) limitations in marriage settlements in favour of volunteers in remainder (*w*). Still, it seems that where purchasers or creditors are concerned, no regard will be paid to circumstances of that nature; but any limitations in the deed which, taken by themselves, must be considered voluntary, will be none the less voluntary and void because they form part of the same agreement (*x*). Referring to this, Rolle, C.J., * said (*y*), "a deed may be fraud- [*535] ulent in part, and good in part, and so it was adjudged in the case of one Lydal (*z*).

So also in a sale for value, a limitation or arrangement by which part of the purchase-money is removed from the reach of creditors will be looked on as a separate settlement of that part of the purchase-money by the vendor, and, if voluntary, void against creditors or subsequent purchasers (*a*); but of course it is different where the way in which the money or other consid-

(*u*) See ante, pp. 342, 357 et seq.

(*v*) Per Lord Hardwicke in *Stephens* v. *Trueman*, 1 Ves. 73; *Penn* v. *Lord Baltimore*, 1 Ves. 453.

(*w*) *Stephens* v. *Trueman*, 1 Ves. 73; *Goring* v. *Nash*, 3 Atk. 136, 188–9; *Vernon* v. *Vernon*, 1 Bro. P. C. 267; *Lechmere* v. *Carlisle*, 3 P. Wms. 211, 222–3; *Hale* v. *Lamb*, 2 Eden, 292; *Davenport* v. *Bishopp*, 2 Y. & C. C. C. 451, S. C. 1 Phil. 698; *Campbell* v. *Ingilby*, 21 Beav. 567, S. C. 1 De G. & J. 393; *Brennan* v. *Brennan*, 2 Ir. R. 2 Eq. 266, 321; *Wollaston* v. *Tribe*, L. R. 9 Eq. 44; and see ante, pp. 275, 391, 392.

(*x*) Lane 22; *Osgood* v. *Strode*, 2 P. Wms. 245; *Johnson* v. *Legard*, 3 Mad. 283, S. C. 6 M. & S. 66; *Cormick* v. *Trapaud*, 6 Dow, P. C. 60; ante, p. 342; notwithstanding *White* v. *Stringer*, 2 Lev. 106.

(*y*) Style 428; and see *Estwick* v. *Caillaud*, 5 T. R. 420–1.

(*z*) Probably *Beverly* v. *Gatacre*, 2 Roll. Rep. 305, cited in *White* v. *Drake*, 3 Kreb. 6.

(*a*) *French* v. *French*, 6 De G. M. & G. 95, and ante, pp. 86, 87; *Neale* v. *Day*, 28 L. J. (N.S.) Ch. 45.

eration was settled formed part of the consideration for the deed (*b*).

Doctrine of marshalling applies in favour of volunteers.

The doctrine of marshalling has been applied in favour of volunteers in several cases. So estates comprised in one mortgage will be marshalled in favour of a voluntary settlement, so as to throw the debt on the unsettled property (*c*). So where a man died having partly exercised a general power to charge £2000, and the money raised was held assets for his creditors, Lord Hardwicke directed the personal estate to be first applied in payment of debts, then the real estate descended, and then the £2000 (*d*).

But this principle does not, it is conceived, apply as between two volunteers (*e*).

And, as it will not be applied to prejudice third parties, so it will not be applied in favour of judgment creditors to the prejudice of volunteers who claim under a prior voluntary settlement. The Court will not interfere actively against a volunteer through the medium of a person claiming only through the voluntary settlor (*f*).

Contribution when enforced against voluntary grantee.

The question of the liability to contribution of a grantee under a voluntary deed has been carefully discussed in the Court of Appeal in Ireland, in the case of *Ker* v. *Ker* (*g*), by Lord O'Hagan and Lord Justice Christian.

Ker v. *Ker*.

[* 536] *In that case K., being seised in fee of L. and other lands, all devised to him by his brother, and subject to a judgment debt created by that brother, conveyed L. by a voluntary deed with an express covenant for further assurance by K. only, and devised his other estates. The judgment debt was paid off partly by K. and partly by the devisees out of the devised estates. The voluntary grantee sold L. subject to any liability to the judgment debt. On a bill filed by the devisees in remainder against the purchaser from the

(*b*) *Wakefield* v. *Gibbon*, 1 Giff. 401.
(*c*) *Aldridge* v. *Forbes*, 9 L. J. (N.S.) Ch. 37; *Hales* v. *Cox*, 32 Beav. 118, commented on in *Ker* v. *Ker*, 4 Ir. R. Eq. 15; *Anstey* v. *Newman*, 39 L. J. (N.S.) Ch. 769.
(*d*) *Bainton* v. *Ward*, 2 Atk. 172.
(*e*) *Boozman* v. *Johnston*, 3 Sim. 377; but see *Lomas* v. *Wright*, 2 My. & K. 769.
(*f*) *Dolphin* v. *Aylward*, L. R. 4 H. L. 502, 503, 505.
(*g*) 4 Ir. R. Eq, 15 reversing S. C. 3 Ir. R. Eq. 489.

voluntary grantee and certain formal parties for contribution, it was held that the voluntary grantee was liable to contribute with the devisees under the will of K. to discharge the incumbrance subject to which all the lands had come to K.

Volunteer under deed and will in same position

The principle upon which the judgments in this case went, was that there is no real difference between a volunteer by deed and a volunteer by will. Each volunteer takes *what* his benefactor had, and *as* he had it. A devisee is liable to contribute with an heir to the discharge of an incumbrance not the debtor of the devisor (*h*). The one takes under the will as a volunteer, the other by descent.

Upon the construction of the deed, also, it was held that the covenant for further assurance by the settlor alone made no difference at all, and did not exempt the grantee from the liability to contribute. The deed simply granted the property in the state in which the grantor held it—that is, burdened in common with other lands to an incumbrance.

When not enforced.

So, the liability to contribution would have existed if the same question had been raised between two voluntary grantees (*i*). It would seem, however, that there would be no liability to contribute if the voluntary deed contained either a covenant against incumbrances or a covenant for quiet enjoyment (*k*).

Penalties under 13 Eliz. c. 5, s. 3.

The 3rd section of the statute 13 Eliz. c. 5, enacts that all and every the parties to such feigned, covinous, or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, and other things before expressed, and being privy and knowing of the same or any of them, which shall wittingly and willingly put in ure, avow, maintain, justify, *or defend the same as true, &c., or shall alien [* 537] or assign any the lands, tenements, goods, leases, or other things before mentioned to him or them conveyed as aforesaid, or any part thereof, shall incur the penalty and forfeiture of one year's value of the said lands, tenements, hereditaments, leases, rents, commons, or other profits of or out of the same, and the whole value

Forfeit one year's value of lands.

(*h*) *Eyre* v. *Green*, 2 Coll. 527.
(*i*) *Ker* v. *Ker*, 4 Ir. R. Eq. at p. 31.
(*k*) *Ker* v. *Ker*, 4 Ir. R. Eq. 21, 34; and see *Hales* v. *Cox*, 32 Beav. 118.

Whole value of goods, &c.

of the said goods and chattels, and also so much money, as are or shall be contained in any such covinous and feigned bond, one moiety to be to the Crown and the other to the parties grieved by such feigned and fraudulent feoffment, &c., to be recovered in a Court of record by action of debt, bill, plaint, or information, &c.; and the offender, being thereof lawfully convicted, is subjected to half a year's imprisonment without bail or mainprise.

Half year's imprisonment.

27 Eliz. c. 4.

By 27 Eliz. c. 4, s. 3 (*l*), a penalty of one year's value of the land fraudulently aliened and also imprisonment for half a year is in almost the same words imposed on those who wittingly and willingly put in ure, &c., any fraudulent conveyance, &c., under that statute.

The statutes to be liberally construed.

It is a clear and fundamental rule in the construction of statutes against frauds that they are to be liberally and beneficially expounded (*m*); and these statutes of Elizabeth, it has frequently been laid down, are to be so construed for the suppression of fraud (*n*), in such a way as to repress the mischief aimed at and to advance the remedy (*o*). Still, it has been several times observed that, in considering whether a conveyance is fraudulent within these statutes, the penal clauses are to be taken into consideration (*p*), so as to narrow their operation.

Penal clauses, how to be construed.

It is an undecided point whether this general rule of construction applies to the penal clauses of these statutes. It is conceived, however, that those clauses which [*538] impose penalties upon persons *must be construed strictly (*q*); and it does not appear to be necessary that the whole of a statute, which is partly remedial, and partly penal, should be construed upon the same principles (*r*).

(*l*) Post, p. 542.

(*m*) *Girton* v. *Champneys*, 1 Bing. 201.

(*n*) *Cadogan* v. *Kennett*, 2 Cowp. 434; *Bullock* v. *Thorne*, F. Moo. 615; *Pauncefoot* v. *Blunt*, cited 3 Rep. 82 a; *Horsman* v. *Gibson*, Fortesc. 32–34, Plowd. 36 b; *Barton* v. *Vanheythuysen*, 11 Hare, 126, 132; ante, p. 4; Wilberforce, Stat. 233–234.

(*o*) *Ex parte Pearson*, L. R. 8 Ch. 672, 673.

(*p*) By Lord Mansfield, in *Doe* v. *Routledge*, 2 Cowp. 710; and Lord Justice Turner in *Ollivet* v. *King*, 8 De G. M. & G. 110, 117.

(*q*) *Girton* v. *Champneys*, 1 Bing. 201; Hardcastle, Stat. 249 et seq.; *Nichols* v. *Hall*, L. R. 8 C. P. 326; *Dyke* v. *Elliott*, L. R. 4 P. C. 191.

(*r*) Wilberforce, Stat. 233; and see *Bores* v. *Booth*, 2 W. Bl. 1226.

A person is liable to the penalty, under either statute, if he has been party or privy to such *feigned, covinous, or fraudulent* feoffment, &c., and if he has wittingly and willingly (*s*) maintained the same against, and disputed the right of, creditors or purchasers.

Any person who aliens or assigns any of the property conveyed to him as aforesaid is *also* liable to the penalty under 13 Eliz. c. 5 (*t*); so that a sale over to a bonâ fide purchaser will not exempt the parties to a fraud on creditors from the penalties attached to it.

Penalty only in cases of actual fraud.

Although Lord Eldon said (*u*), "It is true the construction put upon both these statutes is singular; that a man paying what in other cases is called an obligation of nature, should be considered as within the penalties of these Acts," the case of *Meux* v. *Howell* (*v*) would seem to warrant the inference that the penalty is only recoverable in cases of actual fraud, which would be the effect of a strict interpretation of the words. While the statutes make void feoffments, &c., contrived to *delay, hinder*, or defraud, the penalty is only directed against "such feigned, covinous, or fraudulent feoffments," &c.

Constructive fraud, under these statutes, is the result of many judicial decisions, and is an artificial meaning assigned to the words of the statutes, and not their plain and natural meaning (*w*).

In cases of constructive fraud, if the conveyance is voluntary, it is void, but, if not, it is good. It can hardly be argued that the persons entitled under the settlement would become liable to the penalty by putting in ure or maintaining it for the purpose of deciding a question which they had no other means of ascertaining—viz., whether the settlement was voluntary and therefore *constructively fraudulent, or whether [*539] they were lawfully entitled under it.

The same argument seems to apply with even more force to a case where the voluntary grantees have bonâ fide and for value assigned the property.

(*s*) Hardcastle, Stat. 253–255.
(*t*) Not so under 27 Eliz. c. 4; ante, p. 537.
(*u*) In *Pulvertoft* v. *Pulvertoft*, 18 Ves. 90–1.
(*v*) 4 East. 1, 6–7, 11, 3 Com. Dig. 297; and see *Roe* v. *Mitton*, 2 Wils. 3rd ed. 358*.
(*w*) Ante, pp. 3, 5, 14; pt. ii. ch. ii. ch. iii.; pt. iii. ch. i.

The only direct authority on the point, it appears, is to be found in *Jones* v. *Boulter* (*x*), where Sir James Eyre said (*y*), "The 13 Eliz. is a wholesome law, plainly penned, and I wonder how artificial reason could puzzle it. An artificial rule of construction has entangled Courts of Justice—viz., that a voluntary conveyance of a person indebted at the time is to be deemed fraudulent. It was never yet held that such conveyance subjected the party to the penalties; yet the clauses are co-extensive."

Can defendant refuse to answer *any* interrogatories?

It has been made a question whether the rule that a defendant cannot be compelled to answer interrogatories the replies to which might expose him to indictment, penalties, or forfeiture (*z*), applies to cases of fraud under these statutes.

It might be said that, as all *voluntary* conveyances made in fraud of creditors or purchasers are void against them, whether or not the grantee had notice or knowledge of the fraud (*a*), the setting aside a voluntary deed does not necessarily imply that the persons maintaining it were parties or privies to the fraud, and therefore is not within the rule as to compelling answer.

But the rule is a very strict one—namely, that no person is compellable to answer any question which has a tendency to expose him to a criminal charge, penalty, or forfeiture (*b*).

Whether defendant must answer if then liable to criminal proceedings, penalties, or forfeiture.

The question has twice been raised under 13 Eliz. 5. In *Wich* v. *Parker* (*c*) the bill alleged an assignment [* 540] made by the defendant * to have been a fraudulent contrivance to deprive his creditors of the property composed therein. The defendant by his answer referred to the statute 13 Eliz. c. 5, and said that the plaintiff by his bill sought discovery in respect of a

(*x*) 1 Cox, 288. (*y*) 1 Cox, 294–5.

(*z*) *Claridge* v. *Hoare*, 14 Ves. 59, 65; *Paxton* v *Douglas*, 19 Ves. 225; *Thorpe* v. *Macaulay*, 5 Mad. 229, 231, n.; *Pye* v. *Butterfield*, 5 B. & S. 829; *Allhusen* v. *Labouchere*, 3 Q. B. D. 658; *Fisher* v. *Owen*, 8 Ch. D. 645; *Lamb* v. *Munster*, 10 Q. B. D. 110; *Hunning* v. *Williamson*, 10 Q. B. D. 459; Taylor, Ev. 8th ed. 1242, Peile, Discovery, 46–49; R. S. C. Ord. 31, r. 6.

(*a*) *Partridge* v. *Gopp*, 2 Amb. 596; ante, pp. 78, 193.

(*b*) *Harrison* v. *Southcote*, 1 Atk. 528, 539; *Honeywood* v. *Selwin*, 3 A k, 276; *Maccallum* v. *Turton*, 2 Y. & J. 186; *United States of America* v. *M'Crae*, L. R. 3 Ch. 83; Peile, Discovery, 48, and see *Ex parte Reynolds*, 20 Ch. D. 294; Taylor, Ev. 8th ed. 1242; and Kerr, Discovery, 154.

(*c*) 22 Beav. 59.

matter which, if true, would render him (the defendant) liable to a criminal prosecution under the said statute, and insisted that he was not bound to answer, and declined to answer, any of the interrogatories. The plaintiff amended his bill by striking out the direct allegations of fraud, and again filed his interrogatories, which the defendant still refused to answer on the same ground. The Master of the Rolls decided that the amended bill was substantially the same as the original bill, and that the defendant could not be compelled to answer the amended bill.

And in an interpleader issue at law (*d*) between a claimant (under a fraudulent bill of sale) and an execution debtor, the judgment debtor was called, and asked certain other quesrions as to the real nature and object of the transaction. On being admonished by Willes, J., that he was not bound to answer, as he might thereby criminate himself and expose himself to prosecution (*e*) under the statute of Elizabeth for conspiracy to defraud his creditors, he declined to answer.

It is conceived, therefore, that the rule above cited applies to cases under these statutes.

The case of *Bunn* v. *Bunn* (*f*), which has been cited as establishing the opposite conclusion, does not, it is submitted, support that view, for it was not really a decision upon that precise point. In *Bunn* v. *Bunn* (*f*), two defendants refused to make an affidavit as to documents in their possession, on the ground that if the deed should be proved to be fraudulent under 13 Eliz. c. 5, they, as parties thereto, would be liable to criminal proceedings. The Lords Justices said it had never been the practice to allow these provisions of either of the statutes of Elizabeth to be made an excuse for resisting discovery; that the affidavit must be made; and that if any objection was made * to produce any particu- [* 541] lar document, that objection must be considered thereafter on its merits. *Bunn* v. *Bunn*.

So in *Swanston* v. *Lishman* (*g*), Jessel, M R., said that the rule as to discovery is the exact contrary to that as to production. You must set out every deed you

(*d*) *Michael* v. *Gay*, 1 F. & F. 409.
(*e*) See *Reg.* v. *Smith*, 6 Cox, C. C. 31; and see *Ex parte Reynolds* 20 Ch. D. 294.
(*f*) 4 D. J. & S. 316. (*g*) 45 L. T. (N.S.) 360, 361.

have in your possession, whether you are bound to produce them or not.

This case of *Bunn* v. *Bunn* (*h*), it must be observed, does not decide that production of documents could be enforced if that production rendered the parties liable to criminal proceedings. It merely decides that the affidavit as to documents must be made, in an action under those statutes, even if making it should involve the further question of the right to production and liability to criminal proceedings (*i*).

Production of documents, whether enforced in all cases.

There seems to be no express authority upon the point whether production of documents can be enforced under these statutes, if that production would expose the person producing them to criminal proceedings, penalties, or forfeiture. The case of *Webb* v. *East* (*k*) shews that it is at least doubtful whether documents can be so protected from production.

Principal not penally liable for act of agent, when.

Although if an authority be given to an attorney to effect a particular purpose for another, that other is bound by any act of his attorney in effecting that purpose, it being within the scope of his authority, yet where the defendants in an action under 13 Eliz. c. 5, had instructed their attorney to secure their lawful claim for money due, but had left it to the discretion of the attorney in what way to act so as to do so, Lord Ellenborough thought that, though they might be answerable civiliter for what was done by him under that authority, yet the defendants must have had knowledge of the means used in order to subject them to a penalty within the words of the statute (*l*).

Parties grieved.

"Parties grieved" under these statutes are "creditors and others" (*m*), subsequent purchasers, and trustees in bankruptcy of the settlor (*m*). It may be a ques- [* 542] tion whether a corporation or * company can be a party grieved, so as to be able to sue for the penalty (*n*).

Venue.

A party grieved within 13 Eliz. c. 5, or 27 Eliz. c. 4,

(*h*) 4 D. J. & S. 316.
(*i*) See Bray, Discovery, 341.
(*k*) 5 Ex. D. 109, 112; but see *Hill* v. *Campbell*, L. R. 10 C. P. 222.
(*l*) *Meux* v. *Howell*, 4 East, 1, 7.
(*m*) Ante, p. 170; *Butcher* v. *Harrison*, 4 B. & Ad. 129.
(*n*) *Guardians of St. Leonard's Shoreditch* v. *Franklin*, 3 C. P. D. 377.

is not a common informer within the statutes 31 Eliz. c. 5 (*o*), and 21 Jac. 1, c. 4 (*o*); and therefore may lay his information in any county (*p*).

In the old case of *Poulton* v. *Wiseman* (*q*), on the statute 27 Eliz. c. 4, it was resolved with regard to these clauses— *Poulton* v. *Wiseman.*

That one entire year's profits, which is the penalty of the statute, shall be forfeited without apportionment, as well upon a mortgage as upon an actual sale. So also upon a lease or a petty annuity made by fraud, &c.; one year's value of the land shall be forfeited. Whole year's value. Forfeit on mortgage, lease, &c.

That every defendant that is found guilty shall pay a year's value of the land, every one by himself, and not a year's value jointly among them all. Every defendant liable,

That the infancy of one of the defendants shall not excuse him of that penalty, he being of sixteen years, and privy to that conveyance, and having justified that fraudulent deed to be made bonâ fide; and for that he shall be punished as if he were at full age; and that the penalty cannot be increased or diminished. though an infant. Amount cannot be altered.

Though the statute 13 Eliz. c. 5, only mentions the forfeiture of so much money as shall be contained in a fraudulent *bond*, this must be taken to extend to all bonds, interests, judgments, executions, or gifts, &c., of personal property (*r*). Distinction of amount forfeited, where property real and where personal.

There is a careful distinction between real property, of which one year's value in each statute, and bonds, judgments, &c., relating to personal property in 13 Eliz. c. 5, of which the whole value or amount, is forfeited. So on a fraudulent alienation of lands the offending parties forfeit a year's value of the land, but not the consideration money named in the conveyance (*s*).

*The penalty, it seems, extends to the whole [*543]

(*o*) Repealed in part by 11 & 12 Vict. c. 43, s. 36; 42 & 43 Vict. c. 59.

(*p*) *Allen* v. *Stear*, 2 Cro. Eliz. 645; *Fife* v. *Bousfield*, 6 Q. B. 100; *Lewis* v. *Davis*, L. R. 10 Ex. 86.

(*q*) Noy, 105.

(*r*) See *Meux* v. *Howell*, 4 East, 1, 15; and see the words in the beginning of the section, ante, p. 536.

(*s*) *Butcher* v. *Harrison*, 4 B. & Ad. 129, 1 Nev. & M. 677.

Penalty not confined to amount of debt.

amount fraudulently aliened, and is not confined to the amount of the debt. Thus it was said in an old case (*t*), that if a man be indebted to me in £20, and he make a fraudulent deed of his goods of the value of £2000, although I be defrauded but of the £20, yet he shall forfeit the whole value of the goods so conveyed.

Gift to defeat heriot.

There a man had made a fraudulent gift of his thirty horses to defraud the lords of several manors, of whom he held land of their customary heriots. On his death the plaintiff, one of the lords, sued for the whole value of the thirty horses, because he was entitled to choose the best beast, and was defrauded of his *election* by the gift; but it was finally agreed that the plaintiff should set a price on any one of the thirty horses as the best horse, and demand the value of that horse as forfeit by the statute, and so his election should be saved to him. But according to another report of the same case (*u*) it was held that any of the lords could sue for the value of all the beasts. By 22 Vict. c. 32, the payment of any sum of money imposed by any statute as a penalty or forfeiture upon a convicted offender may be remitted by the Crown.

Imprisonment.

With regard to imprisonment of offenders. An indictment on the 13 Eliz. c. 5, s. 3, alleged that the prisoners devised and prepared a certain feigned, covinous, and fraudulent conveyance of certain lands, and unlawfully, fraudulently, &c., did execute the same conveyance. It was urged in arrest of judgment that the section did not create an indictable offence, and that, if it did, and indictment could not be preferred until after a recovery of damages in a civil action, and that this indictment was bad for not stating in what respect the conveyance was fraudulent. Maule, J., held that the Act created an indictable offence, and that an indictment might be preferred before an action was brought, notwithstanding the words "and also" near the end of the penal section; and that it was not necessary in such an indictment to set out the specific facts which constituted the fraud, and that the words "being thereof lawfully convicted" mean being convicted thereof before some competent tribunal (*v*).

Indictable offence.

Fraud not stated.

How convicted.

(*t*) *Cresswell* v. *Cokes*, 2 Leon. 8; and see *Plowden* v. *Greene*, Co. Ent. 162, pl. 35.

(*u*) 3 Dyer, 351 b. See *Child* v. *Sands*, 1 Salk. 31-2, 3 Lev. 354; Scriven, Copyholds, 5th ed. 267, n. (*x*).

(*v*) *Reg.* v. *Smith*, 6 Cox, C. C. 31. See also *Plowden* v. *Greene*, Co. Ent. 162, pl. 35.

*CHAPTER II. [*544]

COSTS.

Costs under Judicature Act, 1875.

It has been laid down by the House of Lords, that the effect of the Judicature Act, 1875, which gives the Court a discretion as to costs, was to repeal all previous Acts which directed costs to follow certain rules without leaving the Court a discretion (*w*). The judges of the High Court of Justice were thereby enabled to exercise a judicial discretion as to costs in all cases, with certain exceptions (*x*), and to direct the payment of costs where any previous statute was silent as to the costs of proceeding under it (*y*).

Costs under R. S. C. 1883.

By the Rules of the Supreme Court, 1883, the rules contained in and forming a part of the Judicature Act, 1875 (*z*), were annulled, and the Rules of the Supreme Court, 1883, were substituted for them (*a*).

The costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, are now in the discretion of the Court or judge (*x*), so far as relates to any proceedings taken on or after October 24, 1883 (*b*). This rule is subject to the provisions of the Acts and Rules; and to two provisoes contained in it, as to the right of an executor, administrator, trustee, or mortgagee to costs out of an estate or fund, and as to costs following the event in the case of an action, cause, matter, or issue tried with a jury.

[*545] *This rule applies to all proceedings in the High Court of Justice which are not expressly excepted from its operation (*c*).

(*w*) *Garnett* v. *Bradley*, 3 App. Cas. 944; and see *Ex parte Mercer*, 10 Ch. D., per Jessel, M.R., 482.
(*x*) R. S. C. (1883) Ord. 65, r. 1.
(*y*) *Ex parte Mercers' Co.*, 10 Ch. D. 481; *Ex parte Hospital of St. Katherine*, 17 Ch. D. 378; *Re Lee and Hemingway*, 24 Ch. D. 669.
(*z*) *Longman* v. *East*, 3 C. P. D., per Brett, L.J., 156.
(*a*) R. S. C. (1883), and App. O.
(*x*) R. S. C. (1883) Ord. 65, r. 1.
(*b*) *McClellan* v. *McClellan*, 29 Ch. D. 495.
(*c*) Supra.

R. S. C. 1883 do not apply to County Courts.

But it does not apply to proceedings taken in the County Courts, the costs of which are still governed by the County Courts Act, 1867 (*d*).

Discretion exercised by Court according to fixed principles.

But although the Court has now a wide discretion as to costs, yet that judicial discretion is always exercised upon certain fixed principles (*e*).

Under the old practice as to costs the decisions on the statutes of Elizabeth and in cases in which voluntary deeds were set aside for undue influence afforded ample scope for the Court of Chancery to exercise its discretion either in reimbursing those who have been deceived or injured the amount they have expended in obtaining a redress of their wrongs, or in punishing those who have acted unfairly, or who, though entitled to relief, have not been entirely free from blame in the matter before the Court (*f*).

Costs under 13 Eliz. c. 5.

Where a deed is set aside as fraudulent under the statute 13 Eliz. c. 5 it has been held that the utmost the Court can do for the trustees is not to order them to pay costs (*g*).

But trustees have been ordered to pay costs where by their conduct the proceedings have been rendered necessary (*h*), or where they have actively supported the deed (*i*), or have made themselves accessory to a fraud, as by signing a false receipt on the back of the deed (*k*).

[* 546] *A plaintiff suing to set aside the deed may,

(*d*) *Plumb* v. *Craker*, 16 Q. B. D. 40; Judicature Act, 1875, s. 67; 30 & 31 Vict. c. 142, s. 5.

(*e*) See *Fane* v. *Fane*, 13 Ch. D. 228; *Cooper* v. *Whittingham*, 15 Ch. D. 501: *Wilmott* v. *Barber*, 17 Ch. D. 772; *Dicks* v. *Yates*, 18 Ch. D. 76; *The Swansea* v. *The Condor*, 4 P. D. 115; *Harris* v. *Petherick*, 4 Q. B. D. 611; *Foster* v. *Great Western Railway Co.*, 8 Q. B. D. 25, S. C. 515; Daniel, Ch. Pr. 6th ed. 1169, 1170; Morgan & Wurtzburg, Costs. 2nd ed. 1-7.

(*f*) See *Holmes* v. *Penney*, 3 K. & J. 104; *Hale* v. *Metropolitan Saloon Co.*, 4 Drew, 492.

(*g*) *Elsey* v. *Cox*, 26 Beav. 95; and see *Townsend* v. *Westacott*, 2 Beav. 340, S. C. 4 Beav. 58; *Elsey* v. *Lutens*, 8 Hare, 159; *Crossley* v. *Elworthy*, L. R. 12 Eq. 158; and see decree in *Cornish* v. *Clark*, L. R. 14 Eq. at p. 190; and Morgan & Wurtzburg, 2nd ed. 396, 402.

(*h*) *Smith* v. *Dresser*, L. R. 1 Eq. 651; *Tanqueray* v. *Bowles*, L. R. 14 Eq. 151.

(*i*) *Freeman* v. *Pope*, L. R. 9 Eq. 206, S. C. L. R. 5 Ch. 538; see form of decree, Seton, 4th ed. 1369; *Mackay* v. *Douglas*, L. R. 14 Eq. 106, 123.

(*k*) *Turquand* v. *Knight*, 14 Sim. 643.

by praying a *conveyance* by the trustee, and thus treating him as a real trustee, elect to give him a claim to costs (*l*).

Where there was a doubt whether the debts were prior or subject to the settlement, the bill was dismissed without costs (*m*).

Where the deed is set aside as fraudulent in an administration action, and the fund which is subject to it is in court, the trustees may, if there is no imputation on their conduct, have their costs paid out of it (*n*).

And where the deed is upheld, the trustees have been allowed to take their costs out of the settled funds (*o*).

Trustees of a voluntary settlement will be personally liable to pay the costs of any appeal from a decision as to the validity of that settlement (*p*).

Other creditors let in on contributing to costs.

When a deed is set aside by one creditor as void against the creditors of the grantor, the other creditors will be allowed to come in and take the benefit of the decree on paying their proportion of the costs; but not otherwise (*q*), so that the settlement fund cannot be declared applicable to payment of the plaintiff's debt and interest and his costs of suit, unless he has a lien which would entitle him to be paid in priority to other creditors, if any (*r*).

Costs paid from settled fund.

In *Goldsmith* v. *Russell* (*s*) the bill was filed by the plaintiff on behalf of himself and all the other creditors of the settlor, to impeach a settlement made by him. The deed being declared void, an account was directed as to what was due to the plaintiff and the other creditors; and the costs of the plaintiff, and the trustees, and the settlor's wife and daughter, defendants, but not * those of the settlor, were ordered to be [* 547] paid *out of the settlement funds*. But there it seems

(*l*) *Snow* v. *Hole*, V.C., of England, March 1845; Lewin on Trusts, 8th ed. 989.
(*m*) *White* v. *Sansom*, 3 Atk. 410.
(*n*) *In re Turner's Estate*, W. N. (1884) 191; and see *Taylor* v. *Coenen*, 1 Ch. D. 636; Daniel, Ch. Pr. 6th ed. 123.
(*o*) *Kent* v. *Riley*, L. R. 14 Eq. 190.
(*p*) *Ex parte Russell*, 19 Ch. D. 588.
(*q*) *Fletcher* v. *Sedley*, 2 Vern. 3rd ed. 491, n.
(*r*) *Adames* v. *Hallett*, L. R. 6 Eq. 468, 473; ante, pp. 525, 526.
(*s*) 5 De G. M. & G. 556; *Adames* v. *Hallett*, L. R. 6 Eq. 468; *Ponsford* v. *Widnell*, W. N. (1869) 81.

Priority of plaintiff.

the property comprised in the settlement was sufficient to pay all the debts. A plaintiff in such a case will have priority as to his costs of suit.

Creditor taking the risk allowed full costs.

A creditor who, by bringing an action on behalf of himself and all other creditors, has been the means of setting aside a fraudulent settlement, and making the property subject to it available for the creditors, is entitled to have his costs taxed as between solicitor and client, and also as between party and party, and the difference ascertained,—the costs of the plaintiff as between party and party to be paid out of the general fund. Out of the remaining fund there will be set apart a sum equal to the amount of the debts, to be called the creditor's fund, and the difference between the plaintiff's costs, as between solicitor and client and party and party, will be deducted out of that fund, and the remainder of the fund apportioned among the creditors, including the plaintiff, in proportion to the amount of their respective debts (*t*).

Costs given to plaintiff though unsuccessful.

And in *Barrack* v. *M'Culloch* (*u*) where a plaintiff sued for the benefit of the creditors generally, although, under the circumstances, the settlement was not set aside, it was said that as it was a very proper case on behalf of creditors to be sifted, although that expense could not be thrown on the parties who had explained it (i.e., the settlees), the plaintiff should have his costs if ultimately the estate should not be sufficient to pay creditors; because it was a suit by him on behalf of himself and all other creditors, in which he and all the others would share in the benefit, if any had been derived. The bill was therefore dismissed, with costs against the trustees and the settlees, and (the debtor being dead) the common administration decree was made, reserving the question whether those costs should not ultimately be paid out of the estate, as they should be if the estate proved insolvent.

Costs of cestuis que trust.

The costs of the cestuis que trust under a settlement [* 548] set * aside as fraudulent will, when their conduct is free from blame, be thrown upon the property comprised in it (*v*); but if they actively support the

(*t*) *Stanton* v. *Hatfield*, 1 Keen, 358, followed in *Goldsmith* v. *Russell*, 5 De G. M. & G. 557; see Morgan & Wurtzburg, 2nd ed. 202.

(*u*) 3 K. & J. 110, 112.

(*v*) *Ponsford* v. *Widnell*, W.N. (1869) 81; ante, p. 546; Daniel Ch. Pr. 6th ed. 1232.

settlement they will be ordered to pay the costs of the action (*w*).

In a suit by assignees in bankruptcy, where the circumstances are such as to justify inquiry, although the settlement is held valid, no costs will be given against the assignees of the settlor; for it is their duty to inquire into any suspicious transactions, and to try to increase the estate for the creditors (*x*). Costs given to assignees in bankruptcy failing in the suit.

So where the suit was occasioned by the improper conduct of the settlor, although the settlement was upheld, the bill was dismissed without costs as against the assignees of the settlor (*y*).

But where the answers to a bill filed by assignees to upset a transaction apparently voluntary disclosed facts which shewed that there was a valuable consideration, Sir J. L. Knight Bruce, V.C., upheld the deed and said: "The transaction, however, is such that, as to the costs before the answers were in, I am not disposed at present to say anything; but after the answers had disclosed the case, I think that from that time the plaintiffs must pay the costs" (*z*). Assignees have less excuse for instituting suits than others who cannot obtain a discovery without suit, as they can force discovery on oath. Not after the case disclosed.

And where the settlor became bankrupt during a suit properly instituted by creditors against him and the trustee of a settlement and properly conducted, the trustees in his bankruptcy, as he had neglected his duty of stopping that suit, was held not entitled to be paid out of the estate and not liable to pay any costs of the suit subsequent to the bankruptcy (*a*).

Where the trustee of a fraudulent deed was a necessary party to the suit, as the trustee of another deed, he was allowed his * costs against the fraudulent assignor; as also was the grantor of the annuity which had been fraudulently assigned, and they were both to retain so much of their respective costs as the [*549] Costs of trustee of settlement and third party.

(*w*) *Crossley* v. *Elworthy*, L. R. 12 Eq. 158; *Mackay* v. *Douglas*, L. R. 14 Eq. 106, 123.
(*x*) *Ward* v. *Shallet*, 2 Ves. 17; *Thompson* v. *Webster*, 4 Drew. 628, S. C. 4 De G. & J. 606–7.
(*y*) *Kent* v. *Riley*, L. R. 14, Eq. 190.
(*z*) *Pott* v. *Todhunter*, 9 Jur. 521.
(*a*) *Tanqueray* v. *Bowles*, L. R. 14 Eq. 151, 156.

fraudulent assignors could not pay out of what was due from them respectively on account of the annuity (*b*).

Unproved allegations of fraud.

Where an action to set aside a deed is dismissed, unproved allegations of fraud will induce the Court to give a defendant his costs (*c*), as between party and party (*d*); but relief will not always be denied because imputed fraud has not been proved (*e*).

Plaintiff being creditor *and* purchaser; right to sue, and costs allowed him in both characters.

Where a bill impeached a settlement as void against the plaintiff as a creditor and also as a purchaser, and it being held void against him as an equitable mortgagee (purchaser), the defendants contended that the ground of claim that the settlement was void against *creditors* had altogether failed, and that therefore the plaintiff ought to pay the costs incurred in respect of that claim. Sir J. Wigram, V.C., said (*f*) that those who have contended that the plaintiff's equity could not be sustained under the statute 27 Eliz. c. 4, could not with success urge that argument (as to costs) unless they could shew that the claim under the statute 13 Eliz. c. 5, could not be sustained on the present record, or that the evidence in the cause was insufficient to sustain the case. Both of these points were argued.

His Honour thought that the former should be decided in the plaintiff's favour; and that the right to sue in this case was established; and that the evidence, if not already sufficient, was such as would entitle the plaintiff to an opportunity of perfecting it. The question on this point was merely one of costs, and the evidence being strong there was no ground for distingishing the costs of that part of the suit which was founded on the statute 13 Eliz. c. 5, from the other costs.

Costs where no contest.

[* 550] *Where in a suit to set aside a voluntary settlement the relief asked is not contested, the Court will order a reconveyance of the property settled, and di-

(*b*) *Norcott* v. *Dodd*, Cr. & P. 100, 103.

(*c*) *Wakefield* v. *Gibbon*, 1 Giff. 401, 412; *Baker* v. *Bradley*, 7 De G. M. & G. 597, 627; *Clinch* v. *Financial Corporation*, L. R. 5 Eq. 450, S. C. L. R. 4 Ch. 117.

(*d*) *Turner* v. *Collins*, L. R. 12 Eq., per Malins, V.C., 440; varied on the merits and as to costs of trustees, S. C. L. R. 7 Ch. 329; Morgan & Wurtzburg, 2nd ed. 106.

(*e*) *Espey* v. *Lake*, 10 Hare, 260; *Baker* v. *Bradley*, 7 De G. M. & G. 597, 627.

(*f*) *Lister* v. *Turner*, 5 Hare, 281, 291.

rect payment of the costs out of the property so settled (*g*).

Where a man enters into an agreement to buy land knowing that it has been the subject of a voluntary settlement, although he can enforce specific performance of the agreement, he is not entitled as of course to his costs of suit; for he was cognizant of the circumstances connected with the property, and knew that the agreement could not be performed, except through the intervention of the Court. In a case of this kind the costs of the plaintiff and of the representative of the surviving trustee of the settlement were ordered to be paid out of a fund previously set apart for the benefit of the settlor (*h*). Costs under 27 Eliz. c. 4.

In *Dalking* v. *Whimper* (*i*) on such a decree of specific performance, no costs were given against the cestuis que trust of the voluntary deed, and the settlor was ordered to pay the costs of the trustees of the deed; "which were occasioned by his own voluntary act;" but in a similar case the purchaser has been ordered to pay the costs of the trustees of the voluntary settlement (*k*).

So in *Peter* v. *Nicolls* (*l*), where specific performance was inforced against a person who had been let into possession as purchaser and had taken a conveyance of the legal estate and had the title deeds, he was ordered to pay the costs of the suit.

And in a case (*m*) where specific performance of a contract by the settlor for sale of settled property was refused because there appeared to have been sufficient consideration for the settlement, the bill was dismissed with costs as against the defendant the settlee, and without costs as against the defendant the settlor.

Where a voluntary settlement is set aside [551] for fraud and undue influence, the donees as a general rule will have to pay costs only if they support the Costs on setting aside deeds for undue influence.

(*g*) *Thompson* v. *Milligan*, 18 L. T. (N.S.) 899, but see *Ponsford* v. *Widnell*, W. N. (1869) 81; ante, p. 548, note (*v*).
(*h*) *Willats* v. *Busby*, 5 Beav. 193.
(*i*) 26 Beav. 571.
(*k*) *Fletcher* v. *Ketteman*, 10 L. J. (N.S.) Ch. 624.
(*l*) L. R. 11 Eq. 391.
(*m*) *Townend* v. *Toker*, L. R. 1 Ch. 446.

Donees. Third persons.

deed (*n*), and of course if they have refused reasonable terms (*o*), and also third persons if they support such a gift in their favour (*p*). Even a solicitor (*q*) or other third person (*r*), if guilty, not merely of having made the action necessary by his blunder, but of being an acting participator in the fraud, may be mulcted in costs, though not a party to the action.

The court has jurisdiction in cases of fraud, and where a person against whom no relief could otherwise be asked is made a party to a suit on the ground of fraud, it is because the Court has jurisdiction to indemnify the person injured at the expense of all persons, whether solicitors or not, who have been acting participators in the fraud, and it can therefore make any party to the fraud pay the costs of the proceedings which have been rendered necessary by the fraud in which he has taken part (*s*).

But where a voluntary settlement was upheld, the circumstances appearing very suspicious, the donees had only to pay their own costs (*t*).

Where a voluntary deed was set aside on the ground of mutual mistake, the costs of an infant donee were ordered to be paid by the plaintiffs (*u*).

Donor.

But where (*v*) deeds were set aside for undue influence, and there were no other charges established against the solicitor who prepared them beyond that he [* 552] did his best to make the deeds *effectual, and was a friend of the principal defendant, the plaintiff,

(*n*) *Nottidge* v. *Prince*, 2 Giff. 246, 271 ; *Cooke* v. *Lamotte*, 15 Beav. 249; *Tate* v. *Williamson*, L. R. 1 Eq. 528, S. C. L. R. 2 Ch. 55 ; *Mountford* v. *Keene*, 19 W. R. 708 ; *Bainbrigge* v. *Browne*, 18 Ch. D. 603.

(*o*) *Coutts* v. *Ackworth*, L. R. 8 Eq. 558.

(*p*) *Archer* v. *Hudson*, 7 Beav. 551; *Berdoe* v. *Dawson*, 34 Beav. 603; *Rhodes* v. *Bate*, L. R. 1 Ch. 252; and see ante, pp. 503, 504.

(*q*) *Bridgeman* v. *Green*, Wilm. 58, 75, 76; *Huguenin* v. *Baseley*, 14 Ves. 273; *Harvey* v. *Mount*, 8 Beav. 439, 453; *Baker* v. *Loader*, L. R. 16 Eq. 49; *Clark* v. *Girdwood*, 7 Ch. D. 9.

(*r*) *Prideaux* v. *Lonsdale*, 4 Giff. 159, 178, S. C. 1 D. J. & S. 433; *Harvey* v. *Mount*, 8 Beav. 439, 453.

(*s*) *Clark* v. *Girdwood*, 7 Ch. D., per James, L.J., 23, dissenting from *Baker* v. *Loader*, L. R. 16 Eq. 49.

(*t*) *Taylor* v. *Johnston*, 19 Ch. D. 603.

(*u*) *Short* v. *Ridge*, W. N. (1876) 47.

(*v*) *Lyon* v. *Home*, L. R. 6 Eq. 655, 681.

who had by her unwarrantable attacks on him in her affidavits, and by innumerable misstatements, seriously increased the expenses of the suit, was made to pay his costs and her own.

In *Hatch* v. *Hatch* (*w*), though a deed was decreed void against the defendant (a married woman), no costs were given on account of her husband's misconduct, he being particeps criminis.

Bill dismissed without costs.

And if there was reasonable cause for suspicion, a plaintiff impeaching a voluntary transaction as infected by undue influence will not be made to pay costs, although the bill was dismissed (*x*); where, for instance, an agent has taken a gift from his principal without the interposition of any independent third person (*y*).

Trustees.

Where trustees of a voluntary settlement do not uphold the deed, but act honestly and for the best interest of the settlor, they will be allowed their costs (*z*); or if they maintain the voluntary settlement as representing absent parties who cannot be ascertained, for then it is their duty to defend the action (*a*).

But if trustees actively interfere to support a voluntary settlement, and it is set aside, they will be ordered to pay costs (*b*); and of course this will be the case if they also take a beneficial interest under it (*c*).

Where a voluntary settlement is set aside, a trustee, as there is no contract in existence, has no claim to his costs as of right, and therefore cannot appeal from an order giving costs against him (*d*).

Where the Bank of England declined to per- [553]

(*w*) 9 Ves. 292, 298–9; and see *Hoghton* v. *Hoghton*, 15 Beav. 278, 321; *Anderson* v. *Elsworth*, 3 Giff. 154.

(*x*) See *Hunter* v. *Atkins*, 3 My. & K. 113, 157; *Kirwin* v. *Cullen*, 4 Ir. Ch. 322, 333; *Toker* v. *Toker*, 31 Beav. 629, S. C. 3 D. J. & S. 487; *Taylor* v. *Johnston*, 19 Ch. D. 603.

(*y*) *Harris* v. *Tremenheere*, 15 Ves. 40.

(*z*) *Everitt* v. *Everitt*, L. R. 10 Eq. 405; *Phillipps* v. *Mullings*, L. R. 7 Ch. 244; *Turner* v. *Collins*, L. R. 7 Ch. 329.

(*a*) *James* v. *Couchman*, 29 Ch. D. 212.

(*b*) *Mara* v. *Ray*, W. N. (1872) 127; *Dutton* v. *Thompson*, 23 Ch. D. 278.

(*c*) *Irwin* v. *Rogers*, 12 Ir. Eq. Rep. 159.

(*d*) *Dutton* v. *Thompson*, 23 Ch. D. 278.

mit a transfer, on the ground of undue influence on the transferor, it was ordered to pay the costs of a motion by him to direct it to permit the transfer (*e*).

Breach of trust.

Trustees of a voluntary deed must, of course, pay costs in an action to repair a breach of trust (*f*), unless under very special circumstances (*g*), although the trusts were created by their own voluntary act of bounty (*h*).

(*e*) *Larrett* v. *Bank of England*, W. N. (1886) 47.
(*f*) See Lewin on Trusts, 8th ed. 991.
(*g*) See *Smith* v. *French*, 2 Atk. 243, which Lord Hardwicke said was a case of great hardship, and gave no costs; and see *Lanham* v. *Pirie*, 3 Jur. (N.S.) 704.
(*h*) *Drosier* v. *Brereton*, 15 Beav. 226.

*APPENDIX. [*555]

No. I.

13 Eliz. c. 5. A.D. 1570.

An Act against Fraudulent Deeds, Gifts, Alienations, &c.

For the Avoiding and Abolishing of feigned, covinous and fraudulent Feoffments, Gifts, Grants, Alienations, Conveyances, Bonds, Suits, Judgments and Executions, as well of Lands and Tenements as of Goods and Chattels, more commonly used and practised in these Days than hath been seen or heard of heretofore: which Feoffments, Gifts, Grants, Alienations, Conveyances, Bonds, Suits, Judgments and Executions, have been and are devised and contrived of Malice, Fraud, Covin, Collusion or Guile, to the End, Purpose and Intent, to delay, hinder, or defraud Creditors and others of their just and lawful Actions, Suits, Debts, Accounts, Damages, Penalties, Forfeitures, Heriots, Mortuaries and Reliefs, not only to the Let or Hinderance of the due Course and Execution of Law and Justice, but also to the Overthrow of all true and plain Dealing, Bargaining and Chevisance between Man and Man, without which no Commonwealth or civil Society can be maintained or continued.

II. Be it therefore declared, ordained and enacted by the Authority of this present Parliament, That all and every Feoffment, Gift, Grant, Alienation, Bargain and Conveyance of Lands, Tenements, Hereditaments, Goods and Chattels, or of any them, or of any Lease, Rent, Common or other Profit or Charge out of the same Lands, Tenements, Hereditaments, Goods and Chattels, or any of them, by Writing or otherwise, and all and every Bond, Suit, Judgment and Execution at any Time had or made sithence the Beginning of the Queen's Majesty's Reign that now is, or at any Time hereafter to be had or made, to or for any Intent or Purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that Person or Persons, his or their Heirs, Successors, Executors, Administrators and Assigns, and every of them, whose Actions, Suits, Debts, Accounts, Damages, Penalties, Forfeitures, Heriots, Mortuaries and Reliefs, by such guileful, covinous or fraudulent Devices and Practices, as is aforesaid, are, shall or might be in any ways disturbed, hindred, delayed or defrauded) to be clearly and utterly void, frustrate

[* 556] *and of none Effect; any Pretence, Colour, feigned Consideration, expressing of Use, or any other Matter or Thing to the contrary notwithstanding.

III. And be it further enacted by the Authority aforesaid, That all and every the Parties to such feigned, covinous or fraudulent Feoffment, Gift, Grant, Alienation, Bargain, Conveyance, Bonds, Suits, Judgments, Executions and other Things before expressed, and being privy and knowing of the same, or any of them; which at any Time after the Tenth Day of *June* next coming shall wittingly and willingly put in Ure, avow, maintain, justify or defend the same, or any of them, as true, simple, and done, had or made *bonâ fide* and upon good Consideration; or shall alien or assign any the Lands, Tenements, Goods, Leases or other Things before mentioned, to him or them conveyed as is aforesaid, or any Part thereof; shall incur the Penalty and Forfeiture of one Year's Value of the said Lands, Tenements and Hereditaments, Leases, Rents, Commons or other Profits, of or out of the same; and the whole Value of the said Goods and Chattels; and also so much Money as are or shall be contained in any such covinous and feigned Bond; the one Moiety whereof to be to the Queen's Majesty, her Heirs and Successors, and the other Moiety to the Party or Parties grieved by such feigned and fraudulent Feoffment, Gift, Grant, Alienation, Bargain, Conveyance, Bonds, Suits, Judgments, Executions, Leases, Rents, Commons, Profits, Charges, and other Things aforesaid to be recovered in any of the Queen's Courts of Record by Action of Debt, Bill, Plaint or Information, wherein no Essoin, Protection or Wager of Law shall be admitted for the Defendant or Defendants; and also being thereof lawfully convicted, shall suffer Imprisonment for one Half Year without Bail or Mainprise.

IV. Provided always, and be it further enacted by the Authority aforesaid, That whereas sundry common Recoveries of Lands, Tenements and Hereditaments have heretofore been had, and hereafter may be had against Tenant in Tail, or other Tenant of the Freehold, the Reversion or Remainder, or the Right of Reversion or Remainder, then being in any other Person or Persons; that every such common Recovery heretofore had, and hereafter to be had, of any Lands, Tenements or Hereditaments, shall, as touching such Person and Persons which then had any Remainder or Reversion, or Right of Remainder or Reversion, and against the Heirs of every of them, stand, remain and be of such like Force and Effect, and of none other, as the same should have been if this Act had never been had ne made.

V. Provided always, and be it further enacted by the Authority aforesaid, That this Act, or any Thing therein contained, shall not extend to make void any Estate or Conveyance, by reason whereof any Person or Persons shall use any Voucher in any Writ of *Formedon*, now depending or hereafter to be depending, but that all and every such Vouchers in any Writ of *Formedon* shall [* 557] stand and be in like *Force and Effect, as if this Act had never been had ne made; any Thing before in this Act contained to the contrary notwithstanding.

VI. Provided also, and be it enacted by the Authority aforesaid, That this Act, or any Thing therein contained, shall not extend to any Estate or Interest in Lands, Tenements, Hereditaments, Leases, Rents, Commons, Profits,

Goods or Chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which Estate or Interest is or shall be upon good Consideration and *bond fide* lawfully conveyed or assured to any Person or Persons, or Bodies Politick or Corporate, not having at the Time of such Conveyance or Assurance to them made, any Manner of Notice or Knowledge of such Covin, Fraud or Collusion as is aforesaid; any Thing before mentioned to the contrary hereof notwithstanding.

VII. This Act to endure unto the End of the First Session of the next Parliament.

[*Made perpetual*, 29 *Eliz. c.* 5, § 1, 2; *and see* 27 *Eliz. c.* 4.

No. II.

27 ELIZ. c. 4. A.D. 1585.

An Act against Covenous and Fraudulent Conveyances.

FORASMUCH as not only the Queen's most excellent Majesty, but also divers of her Highness good and loving Subjects, and Bodies Politick and Corporate, after Conveyances obtained or to be obtained, and Purchases made or to be made of Lands, Tenements, Leases, Estates and Hereditaments, for Money or other good Considerations, may have, incur and receive great Loss and Prejudice by reason of fraudulent and covenous Conveyances, Estates, Gifts, Grants, Charges and Limitations of Uses heretofore made or hereafter to be made of, in or out of Lands, Tenements or Hereditaments so purchased or to be purchased; which said Gifts, Grants, Charges, Estates, Uses and Conveyances were or hereafter shall be meant and intended by the Parties that so make the same to be frandulent and covenous, of Purpose and Intent to deceive such as have purchased or shall purchase the same, or else by the secret Intent of the Parties the same to be to their own proper Use, and at their free Disposition coloured nevertheless by a fained Countenance and Shew of Words and Sentences, as though the same were made *bond fide*, for good Causes, and set just and lawful Considerations:'

II. For remedy of which Inconveniences, and for the avoiding of such fraudulent, fained and covenous Conveyances, Gifts, Grants, Charges, Uses and Estates, and for the Maintenance of upright and *just Dealing in the [*558] the purchasing of Lands, Tenements and Hereditaments; Be it ordained and enacted by the Authority of this Present Parliament, That all and every Conveyance, Grant, Charge, Lease, Estate, Incumbrance and Limitation of Use or Uses of, in or out of any Lands, Tenements or other Hereditaments whatsoever, had or made any Time heretofore sithence the Beginning of the Queen's Majesty's Reign that now is, or at any Time hereafter to be had or made, for the Intent and of purpose to defraud and deceive such Person or Persons, Bodies Politick or Corporate, as have purchased or shall afterwards purchase in Fee Simple, Fee Tail, for Life, Lives or Years, the same Lands, Tenements and Hereditaments, or any Part or Parcel thereof, so formerly conveyed, granted,

leased, charged, incumbered or limited in Use, or to defraud and deceive such as have or shall purchase any Rent, Profit or Commodity in or out of the same, or any Part thereof, shall be deemed and taken only as against that Person and Persons, Bodies Politick and Corporate, his and their Heirs, Successors, Executors, Administrators and Assigns, and against all and every other Person and Persons lawfully having or claiming by, from or under them, or any of them, which have purchased or shall hereafter purchase for Money or other good consideration, the same Lands, Tenements or Hereditaments, or any Part or Parcel thereof, or any Rent, Profit or Commodity in or out of the same, to be utterly void, frustrate and of none Effect, any Pretence, Colour, fained Consideration, or expressing of any Use or Uses to the contrary notwithstanding.

III. And be it further enacted by the Authority aforesaid, That all and every the Parties to such fained covenous and fraudulent Gifts, Grants, Leases, Charges or Conveyances before expressed, or being privy and knowing of the same or any of them, which after the Twentieth Day of *April* next coming shall wittingly and willingly put in use, avow, maintain, justify or defend the same or any of them, as true, simple and done, had or made, *bonâ fide*, or upon good Consideration, to the Disturbance or Hindrance of the said Purchaser or Purchasers, Lessees or Grantees, or of or to the Disturbance or Hindrance of their Heirs, Successors, Executors, Administrators, or Assigns, or such as have or shall claim any Thing by, from or under them or any of them, shall incur the Penalty and Forfeiture of one Year's Value of the said Lands, Tenements, and Hereditaments so purchased or charged; the one Moiety whereof to be to the Queen's Majesty, her Heirs and Successors, and the other Moiety to the Party or Parties grieved by such fained and fraudulent Gift, Grant, Lease, Conveyance, Incumbrance or Limitation of Use to be recovered in any of the Queen's Courts of Record, by Action of Debt, Bill, Plaint or Information, wherein no Essoin, Protection or Wager of Law shall be admitted for the Defendant or Defendants; and also being thereof lawfully convicted, shall suffer Imprisonment for One Half Year without Bail or Mainprize.

[* 559] IV. Provided also, and be it enacted by the Authority aforesaid, That this Act or any Thing therein contained shall not extend or be construed to impeach, defeat, make void or frustrate any Conveyance, Assignment of Lease, Assurance, Grant, Charge, Lease, Estate, Interest, or Limitation of Use or Uses, of, in, to or out of any Lands, Tenements or Hereditaments, heretofore at any Time had or made, or hereafter to be had or made, upon or for good Consideration and *bonâ fide*, to any person or persons, Bodies Politick or Corporate; any Thing before mentioned to the contrary hereof notwithstanding.

V. And be it further enacted by the Authority aforesaid, That if any Person or Persons have heretofore sithence the Beginning of the Queen's Majesty's Reign that now is, made or hereafter shall make any Conveyance, Gift, Grant, Demise, Charge, Limitation of Use or Uses, or Assurance of, in or out of any Lands, Tenements or Hereditaments, with any Clause, Provision, Article or Condition of Revocation, Determination or Alteration, at his or their Will or Pleasure, of such Conveyance, Assurance, Grants, Limitations of Uses and Estates of, in or out of the said Lands, Tenements or Hereditaments, or of, in or out of any Part or Parcel of them, contained or mentioned in any Writing, Deed of Indenture of such Assurance, Conveyance, Grant or Gift; and after

such Conveyance, Grant, Gift, Demise, Charge, Limitation of Uses or Assurance so made or had, shall or do bargain, sell, demise, grant, convey or charge the same Lands, Tenements or Hereditaments, or any Part or Parcel thereof, to any Person or Persons, Bodies Politick or Corporate, for Money or other good Consideration paid or given (the said First Conveyance, Assurance, Gift, Grant, Demise, Charge or Limitation, not by him or them revoked, made void or altered, according to the Power and Authority reserved or expressed unto him or them in and by the said secret Conveyance, Assurance, Gift or Grant,) That then the said former Conveyance, Assurance, Gift, Demise and Grant, as touching the said Lands, Tenements and Hereditaments, so after bargained, sold, conveyed, demised or charged, against the said Bargainees, Vendees, Lessees, Grantees and every of them, their Heirs, Successors, Executors, Administrators and Assigns, and against all and every Person and Persons which have, shall or may lawfully claim any Thing, by, from or under them or any of them, shall be deemed, taken and adjudged to be void, frustrate, and of none Effect, by Virtue and Force of this present Act.

VI. Provided nevertheless, That no lawful Mortgage made or to be made *bond fide*, and without Fraud or Covin, upon good Consideration, shall be impeached or impaired by Force of this Act, but shall stand in the like Force and Effect as the same should have done if this Act had never been had nor made; any Thing in this Act to the contrary in any wise notwithstanding.

VII. And be it further enacted by the Authority aforesaid, That all * the whole Tenor and Contents of All Statutes Merchant and Statutes [* 560] of the Staple, hereafter to be knowledged, shall within Six Months next after such Knowledging, be entered in the Office of the Clerk of Recognizances, taken according to the Statute made in the Three and Twentieth Year of the Reign of the late King *Henry* the Eighth, by the shewing forth of the said Statute Merchant or Statute Staple so knowledged unto the said Clerk; which said Clerk of the Recognizances shall enter, or cause to be entred, the same Statutes into a Book for that purpose to be provided and safely kept by him, taking Eight Pence and no more, for every such Entry.

VIII. And be it further enacted, That if the Party to whom any such Statute Merchant or of the Staple shall be knowledged, his Executors or Administrators do or shall not within Four Months next after the Knowledging of any such Statute, bring and deliver, or cause to be brought and delivered, unto the said Clerk, or his Deputy or Deputies for the Time being, all and every such Statute and Statutes as shall be so knowledged to him or to his Use, whereby and to the Intent that the said Clerk, his Deputy or Deputies, may take and enter a true Copy thereof; that then every such Statute Merchant and of the Staple not so entered shall be void, frustrate and of none Effect, against all and every such Person and Persons, and Bodies Politick and Corporate, their Heirs, Successors, Executors, Administrators and Assigns only, as shall, after the Knowledging of the said Statutes or any of them, purchase for Money or other good Consideration, the Lands, Tenements or Hereditaments which were liable to the same Statute Merchant or of the Staple, or any Part or Parcel thereof or any Rent, Lease or Profit of or out of the same.

IX. And if the said Clerk, or his Deputy or Deputies for the Time being, shall not upon such Shewing and Delivery unto him or them of any Statute

Merchant or of the Staple, enter or cause to be entred the same in his said Book within the said Time of Six Months, and also endorse upon every such Statute so by him entred, the Day and Year of his said Entry, with his or their own Name; that then every such Clerk failing or defective in that Behalf, shall forfeit and lose for every Statute Merchant and of the Staple so brought unto him or them, and not entered and endorsed, or caused to be entred and endorsed as aforesaid, the Sum of Twenty Pounds; the one Moiety whereof to be to the Queen's Majesty, her Heirs and Successors, and the other Moiety to him or them that will sue for the same in any of the Queen's Courts of Record, by Actions of Debt, Bill, Plaint or Information wherein no Essoin, Protection or Wager of Law shall be allowed.

X. And be it further enacted by the Authority aforesaid, That no Clerk of the said Recognizance shall or may take, for or in respect of any Search to be made for or concerning any Statute Merchant or of the Staple so to be entered as aforesaid, above Two pence for one Year's Search, and so after the Rate of [* 561] Two pence for every Year and * not above, upon Pain and forfeit to lose to the Party or Parties grieved thereby, Twenty Times as much as he shall take contrary to the true Meaning of this Act, to be recovered in any of the Queen's Majesty's Courts of Record, by Action of Debt, Bill, Plaint or Information, wherein no Protection or Wager of Law shall be allowed. This Act to continue for the Space of Ten Years, and from thenceforth unto the End of the Parliament then next following.

XI. Provided always, That this Act, nor any Thing therein contained, shall extend or be construed to make good any Purchase, Grant, Lease, Charge or Profit, of, in or out of any Lands, Tenements or Hereditaments heretofore made void, defeated or undone, by reason of any former Conveyance, Grant or Assurance, so as the Party or Parties, or their Heirs or Assigns, which have so defeated or made void the same were in actual Possession the First Day of this present Parliament, of or in the said Lands, Tenements or Hereditaments, whereof or out of which any such Purchase, Grants, Lease, Charge or Profit was made.

XII. Provided that this Act, nor any Thing therein contained, shall extend in any Sort to restrain or impair the Jurisdiction, Power or Authority of the Court of Star Chamber. [*Star Chamber abolished* 16 *Car.* 1, *c.* 10.]

[*Made perpetual*, 39 *Eliz. c.* 18. §§ 31, 32.]

No. III.

41 & 42 Vict. c. 31.

An Act to consolidate and amend the law for preventing Frauds upon Creditors by Secret Bills of Sale of Personal Chattels. [22*nd July* 1878.]

Whereas it is expedient to consolidate and amend the law relating to bills of sale of personal chattels:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice

and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as the Bills of Sale Act, 1878.

2. This Act shall come into operation on the first day of January *one [*562] thousand eight hundred and seventy-nine, which day is in this Act referred to as the commencement of this Act.

3. This Act shall apply to every bill of sale executed on or after the first day of January one thousand eight hundred and seventy-nine (whether the same be absolute, or subject or not subject to any trust) whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale.

4. In this Act the following words and expressions shall have the meanings in this section assigned to them respectively, unless there be something in the subject or context repugnant to such construction; that is to say:

The expression "bill of sale" shall include bills of sale, assignments, transfers, declarations of trust without transfers, inventories of goods with receipts thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, but shall not include the following documents; that is to say, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented:

The expression "personal chattels" shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but shall not include chattel interests in real estate, nor fixtures (except trade machinery as hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow, nor shares or interests in the stock, funds, or securities of any government, or in the capital or property of incorporated or joint-stock companies, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant *or agreement or of the cus- [*563] tom of the country ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale:

Personal chattels shall be deemed to be in the "apparent possession" of the

person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person :

"Prescribed" means prescribed by rules made under the provisions of this Act.

5. From and after the commencement of this Act trade machinery shall, for the purposes of this Act, be deemed to be personal chattels, and any mode of disposition of trade machinery by the owner thereof which would be a bill of sale as to any other personal chattels shall be deemed to be a bill of sale within the meaning of this act.

For the purposes of this Act—

"Trade machinery" means the machinery used in or attached to any factory or workshop :

1st. Exclusive of the fixed motive powers, such as the waterwheels and steam engines, and the steam boilers, donkey engines, and other fixed appurtenances of the said motive powers ; and,

2nd. Exclusive of the fixed power machinery, such as the shafts, wheels, drums, and their fixed appurtenances, which transmit the action of the motive powers to the other machinery, fixed and loose ; and,

3rd. Exclusive of the pipes for steam, gas, and water in the factory or workshop.

The machinery or effects excluded by this section from the definition of trade machinery shall not be deemed to be personal chattels within the meaning of this Act.

"Factory or workshop" means any premises on which any manual labour is exercised by way of trade, or for purposes of gain, in or incidental to the following purposes or any of them ; that is to say :

(*a*) In or incidental to the making any article or part of an article ; or

(*b*) In or incidental to the altering, repairing, ornamenting, finishing, of any article ; or

(*c*) In or incidental to the adapting for sale any article.

6. Every attornment, instrument, or agreement, not being a mining lease, [* 564] whereby a power of distress is given or agreed to be given by * any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale within the meaning of this Act of any personal chattels which may be seized or taken under such power of distress.

Provided, that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent.

7. No fixtures or growing crops shall be deemed, under this Act, to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow, without otherwise taking possession of or dealing with such land or building, or land, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed, or in the land on which such crops grow, is also conveyed or assigned to the same persons or person.

The same rule of construction shall be applied to all deeds or instruments, including fixtures or growing crops, executed before the commencement of this Act and then subsisting and in force, in all questions arising under any bankruptcy, liquidation, assignment for the benefit of creditors, or execution of any process of any court, which shall take place or be issued after the commencement of this Act.

8. Every bill of sale to which this Act applies shall be duly attested and shall be registered under this Act, within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given, otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as against all sheriffs' officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any court authorizing the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at or after the time of filing the petition for bankruptcy or liquidation, or of the execution of such assignment, or of executing such process (as the case may be), and after the expiration of such seven days are in the possession or apparent possession of the person making such bill of sale (or of any person *against whom the process has issued under or in the execution of [* 565] which such bill has been made or given, as the case may be).

9. Where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale, and comprises all or any part of the personal chattels comprised in such prior bill of sale, then, if such subsequent bill of sale is given as a security for the same debt as is secured by the prior bill of sale, or for any part of such debt, it shall to the extent to which it is a security for the same debt or part thereof, and so far as respects the personal chattels or part thereof comprised in the prior bill, be absolutely void, unless it is proved to the satisfaction of the Court having cognizance of the case that the subsequent bill of sale was bonâ fide given for the purpose of correcting some material error in the prior bill of sale, and not for the purpose of evading this Act.

10. A bill of sale shall be attested and registered under this Act in the following manner:

(1) The execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execu-

tion of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor:

(2) Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill and of every such schedule and inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill of sale, shall be presented to and the said copy and affidavit shall be filed with the registrar within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed:

(3) If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void.

[* 566] * In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels.

A transfer or assignment of a registered bill of sale need not be registered.

11. The resignation of a bill of sale, whether executed before or after the commencement of this Act, must be renewed once at least every five years, and if a period of five years elapses from the registration or renewed registration of a bill of sale without a renewal or further renewal (as the case may be), the registration shall become void.

The renewal of a registration shall be effected by filing with the registrar an affidavit stating the date of the bill of sale and of the last registration thereof, and the names, residences, and occupations of the parties thereto as stated therein, and that the bill of sale is still a subsisting security.

Every such affidavit may be in the form set forth in the Schedule (A) to this Act annexed.

A renewal of registration shall not become necessary by reason only of a transfer or assignment of a bill of sale.

12. The registrar shall keep a book (in this Act called "the register") for the purposes of this Act, and shall, upon the filing of any bill of sale or copy under this Act, enter therein in the form set forth in the second schedule (B) to this Act annexed, or in any other prescribed form, the name, residence, and occupation of the person by whom the bill was made or given (or in case the same was made or given by any person under or in the execution of process, then the name, residence, and occupation of the person against whom such process was issued, and also the name of the person or persons to whom or in whose

favour the bill was given), and the other particulars shown in the said schedule or to be prescribed under this Act, and shall number all such bills registered in each year consecutively, according to the respective dates of their registration.

Upon the registration of any affidavit of renewal the like entry shall be made, with the addition of the date and number of the last previous entry relating to the same bill, and the bill of sale or copy originally filed shall be thereupon marked with the number affixed to such affidavit of renewal.

The registrar shall also keep an index of the names of the grantors of registered bills of sale with reference to entries in the register of the bills of sale given by each such grantor.

Such index shall be arranged in divisions corresponding with the letters of the alphabet, so that all grantors whose surnames begin with the same letter (and no others) shall be comprised in one division, but the arrangement within each such division need not be strictly alphabetical.

13. The masters of the Supreme Court of Judicature attached to [567] the Queen's Bench Division of the High Court of Justice, or such other officers as may for the time being be assigned for this purpose under the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, shall be the registrar for the purposes of this Act, and any one of the said masters may perform all or any of the duties of the registrar.

14. Any judge of the High Court of Justice, on being satisfied that the omission to register a bill of sale or an affidavit of renewal thereof within the time prescribed by this Act, or the omission or misstatement of the name, residence, or occupation of any person, was accidental or due to inadvertence, may in his discretion order such omission or misstatement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration on such terms and conditions (if any) as to security, notice by advertisement or otherwise, or as to any other matter, as he thinks fit to direct.

15. Subject to and in accordance with any rules to be made under and for the purposes of this Act, the registrar may order a memorandum of satisfaction to be written upon any registered copy of a bill of sale, upon the prescribed evidence being given that the debt (if any) for which such bill of sale was made or given has been satisfied or discharged.

16. Any person shall be entitled to have an office copy or extract of any registered bill of sale, and affidavit of execution filed therewith, or copy thereof, and of any affidavit filed therewith, if any, or registered affidavit of renewal, upon paying for the same at the like rate as for office copies of judgments of the High Court of Justice; and any copy of a registered bill of sale, and affidavit purporting to be an office copy thereof, shall in all courts and before all arbitrators or other persons, be admitted as primâ facie evidence thereof, and of the fact and date of registration as shown thereon. Any person shall be entitled at all reasonable times to search the register and every registered bill of sale, upon payment of one shilling for every copy of a bill of sale inspected; such payment shall be made by a judicature stamp.

17. Every affidavit required by or for the purposes of this Act may be sworn before a master of any division of the High Court of Justice, or before any commissioner empowered to take affidavits in the Supreme Court of Judicature.

Whoever wilfully makes or uses any false affidavit for the purposes of this Act shall be deemed guilty of wilful and corrupt perjury.

18. There shall be paid and received in common law stamps the following fees, viz. :—

On filing a bill of sale	2s.
On filing the affidavit of execution of a bill of sale	2s.
On the affidavit used for the purpose of re-registering a bill of sale (to include the fee for filing	5s.

[* 568] *19. Section twenty-six of the Supreme Court of Judicature Act, 1875, and any enactments for the time being in force amending or substituted for that section, shall apply to fees under this Act, and an order under that section may, if need be, be made in relation to such fees accordingly.

20. Chattels comprised in a bill of sale which has been and continues to be duly registered under this Act shall not be deemed to be in the possession, order, disposition of the grantor of the bill of sale within the meaning of the Bankruptcy Act, 1869.

21. Rules for the purposes of this Act may be made and altered from time to time by the like persons and in the like manner in which rules and regulations may be made under and for the purposes of the Supreme Court of Judicature Acts, 1873 and 1875.

22. When the time for registering a bill of sale expires on a Sunday, or other day on which the registrar's office is closed, the registration shall be valid if made on the next following day on which the office is open.

23. From and after the commencement of this Act, the Bills of Sale Act, 1854, and the Bills of Sale Act, 1866, shall be repealed: Provided that (except as is herein expressly mentioned with respect to construction and with respect to renewal of registration) nothing in this Act shall affect any bill of sale executed before the commencement of this Act, and as regards bills of sale so executed the Acts hereby repealed shall continue in force.

Any renewal after the commencement of this Act of the registration of a bill of sale executed before the commencement of this Act, and registered under the Acts hereby repealed, shall be made under this Act in the same manner as the renewal of a registration made under this Act.

24. This Act shall not extend to Scotland or to Ireland.

SCHEDULES.

SCHEDULE A.

I [*A. B.*] of do swear that a bill of sale, bearing date the day of 18 [*insert the date of the bill*], and made between [*insert the names and descriptions of the parties in the original bill of sale*], and which said bill of sale [*or*, and a copy of which said bill of sale, *as the case may be*] was registered on the day of 18 [*insert date of registration*], is still a subsisting security.

Sworn, &c.

SCHEDULE B. [*569]

Satisfaction entered.	No.	By whom given (or against whom process issued).			To whom given.	Nature of instrument.	Date.	Date of registration.	Date of registration of affidavit of renewal.
		Name.	Residence.	Occupation.					

No. IV.

45 & 46 VICT. c. 43.

An Act to amend the Bills of Sale Act, 1879. [*18th August 1882.*]

WHEREAS it is expedient to amend the Bills of Sale Act, 1878:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as the Bills of Sale Act (1878) Amendment Act, 1882; and this Act and the Bills of Sale Act, 1878, may be cited together as the Bills of Sale Acts, 1878 and 1882.

2. This Act shall come into operation on the first day of November one thousand eight hundred and eighty-two, which date is hereinafter referred to as the commencement of this Act.

3. The Bills of Sale Act, 1878, is hereinafter referred to as "the principal Act," and this Act shall, so far as is consistent with the tenor thereof, be construed as one with the principal Act; but unless the context otherwise requires shall not apply to any bill of sale duly registered before the commencement of this Act, so long as the registration thereof is not avoided by non-renewal or otherwise.

The expression "bill of sale," and other expressions in this Act, have the same meaning as in the principal Act, except as to bills of sale or other documents mentioned in section four of the principal Act, which may be given otherwise than by way of security for the payment of money, to which last-mentioned bills of sale and other documents this Act shall not apply.

[*570] *4. Every bill of sale shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale ; and such bill of sale, save as hereinafter mentioned, shall have effect only in respect of the personal chattels specifically described in the said schedule ; and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described.

5. Save as hereinafter mentioned, a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill of sale.

6. Nothing contained in the foregoing sections of this Act shall render a bill of sale void in respect of any of the following things ; that is to say :

(1) Any growing crops separately assigned or charged where such crops were actually growing at the time when the bill of sale was executed.
(2) Any fixtures separately assigned or charged, and any plant or trade machinery where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to such bill of sale.

7. Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes :—

(1) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security :
(2) If the grantor shall become a bankrupt, or suffer the said goods or any of them to be distrained for rent, rates, or taxes :
(3) If the grantor shall fraudulently either remove or suffer the said goods, or any of them, to be removed from the premises :
(4) If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes :
(5) If execution shall have been levied against the goods of the grantor under any judgment at law :

Provided that the grantor may within five days from the seizure or taking possession of any chattels on account of any of the above-mentioned causes, apply to the High Court, or to a judge thereof in chambers, and such court or judge, if satisfied that by payment of money or otherwise the said cause of seizure no [*571] longer exists, may *restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just.

8. Every bill of sale shall be duly attested, and shall be registered under the principal Act within seven clear days after the execution thereof, or if it is executed in any place out of England, then within seven clear days after

the time at which it would in the ordinary course of post arrive in England if posted immediately after the execution thereof; and shall truly set forth the consideration for which it was given; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein.

9 A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule in this Act annexed.

10. The execution of every bill of sale by the grantor shall be attested by one or more creditable witness or witnesses, not being a party or parties thereto. So much of section ten of the principal Act as requires that the execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and that the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting witness, is hereby repealed.

11. Where the affidavit (which under section ten of the principal Act is required to accompany a bill of sale when presented for registration) describes the residence of the person making or giving the same or of the person against whom the process is issued, to be in some place outside the London bankruptcy district as defined by the Bankruptcy Act, 1869, or where the bill of sale describes the chattels enumerated therein as being in some place outside the said London bankruptcy district, the registrar under the principal Act shall forthwith and within three clear days after registration in the principal registry, and in accordance with the prescribed directions, transmit an abstract in the prescribed form of the contents of such bill of sale to the County Court registrar in whose district such places are situate, and if such places are in the district of different registrars to each such registrar.

Every abstract so transmitted shall be filed, kept and indexed by the registrar of the County Court in the prescribed manner, and any person may search, inspect, make extracts from, and obtain copies of the abstract so registered, in the like manner, and upon the like terms as to payment or otherwise, as near as may be, as in the case of bills of sale registered by the registrar under the principal Act.

12. Every bill of sale made or given in consideration of any sum under thirty pounds shall be void.

13. All personal chattels seized or of which possession is taken after the commencement of this Act, under or by virtue of any bill of sale (whether registered before or after the commencement of this Act), shall remain on the premises where they were so seized or so taken posession of, and shall not be removed or sold until after the *expiration of five clear days from the [*572] day they were so seized or so taken possession of.

14. A bill of sale to which this Act applies shall be no protection in respect of personal chattels included in such bill of sale, which but for such bill of sale would have been liable to distress under a warrant for the recovery of taxes and poor and other parochial rates.

15. The eighth and twentieth sections of the principal Act, and also all other enactments contained in the principle Act which are inconsistent with this Act are repealed, but this repeal shall not affect the validity of anything done or suffered under the principal Act before the commencement of this Act.

16. So much of the sixteenth section of the principal Act as enacts that any person shall be entitled at all reasonable times to search the register and every registered bill of sale upon payment of one shilling for every copy of a bill of sale inspected, is hereby repealed; and from and after the commencement of this Act any person shall be entitled at all reasonable times to search the register, on the payment of a fee of one shilling, or such other fee as may be prescribed, and subject to such regulations as may be prescribed, and shall be entitled at all reasonable times to inspect, examine, and make extracts from any and every registered bill of sale without being required to make a written application, or to specify any particulars in reference thereto, upon payment of one shilling for each bill of sale inspected, and such payment shall be made by a judicature stamp: Provided, that the said extracts shall be limited to the dates of execution, registration, renewal of registration, and satisfaction, to the names, addresses, and occupation of the parties, to the amount of the consideration and to any further prescribed particulars.

17. Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company.

18. This act shall not extend to Scotland or Ireland.

SCHEDULE.

FORM OF BILL OF SALE.

This indenture, made the day of , between *A. B.* of of the one part, and *C. D.* of of the other part, witnesseth that in consideration of the sum of £ now paid to *A. B.* by *C. D.*, the receipt of which the said *A. B.* hereby acknowledges [*or whatever else the consideration may be*], he the said *A. B.* doth hereby [*573] assign unto *C. D.*, his executors, *administrators and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed, by way of security for the payment of the sum of £ , and interest thereon at the rate of per cent. per annum [*or whatever else may be the rate*]. And the said *A. B.* doth further agree and declare that he will duly pay to the said *C. D.* the principal sum aforesaid, together with the interest then due, by equal payment of £ on the day of [*or whatever else may be the stipulated times or time of payment*]. And the said *A. B.* doth also agree with the said *C. D.* that he will [*here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security.*]

Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said *C. D.* for any cause other than those specified in section seven of the Bills of Sale Act (1878) Amendment Act, 1882.

In witness, &c.

Signed and sealed by the said *A. B.* in the presence of me, *E. F.*
[*add witness's name, address, and description*]

CASES *selected from the valuable* COXE AND MELMOTH MSS., *and published by permission.*

No. V.

Stokes v. *Stokes.*

Melmoth MSS., Vol. I. p. 23.

The plaintiff and her husband living in some difference, they agreed to part, and he was to allow her £20 a year for a separate maintenance. Thereupon he entered into articles with two friends of his wife's to pay her £20 a year during so long time as she should live apart from him and should maintain herself at her own charge, and the trustees covenanted to save him harmless against all debts that his wife should contract during the time that they lived asunder. The husband paid the £20 a year for some time, but afterwards being sued for a debt of his wife's (in which action the plaintiff was nonsuited and paid the usual costs), he refused to pay the £20 a year, and thereupon the wife preferred a bill against her husband and the trustees to have an execution of this agreement, to which the husband put in his answer, and thereby confessed the agreement, but said that he was willing to receive his wife, and said that if she would come home to him he would provide for her, and therefore prayed that the articles might be set aside. And it was *urged in his behalf that to decree [*574] a performance of this agreement would be to decree a divorce, which this Court would never do; and so my Lord Nottingham refused to do in the case of *Mildmay* v. *Mildmay* (*a*). But it was answered by the Court that this differs from that case, for there was an elopement, but here is a parting by consent, and the husband had put it out of his own power to take his wife, for he has agreed to pay her £20 so long as she will live from him and maintain herself, and accordingly it was decreed that the articles were good, and that the husband should pay the arrears and the growing rent, out of which should be deducted what the suit had cost him over and above the costs received upon the nonsuit; but the defendant was to pay the costs of this suit.

No. VI.

Vernon v. *Yaldon.*

Melmoth MSS., Vol III. p. 238.

Obligee in a bond gives a declaration of trust declaring that his name was used in trust for A., and afterwards he assigns this bond for a valuable consideration to B., who has no notice of the deed of trust. Obligee dies and B. gets administration. The plaintiff, who was the obligor, brings a bill of inter-

(*a*) 1 Vern. 53.

pleader against A. and B., who both claimed the debt, and the question was to whom it belonged. It was insisted for B., that, having taken administration to the obligee, he had both law and equity on his side, and therefore was in a better condition than A., who had only equity, as where a man purchases and takes a conveyance in the name of a trustee, and assigns his equitable interest to one, and afterwards makes a second assignment of his equitable interest to another for a valuable consideration, who has no notice of the first assignment, and the second assignee gets in the legal estate from the trustee, he shall hold against the first assignee.

The Master of the Rolls (*b*) was of opinion that B. had no right to the money due on the bond, for, though he was administrator to the obligee, and had by that means the legal interest of the bond in him, yet he could be in no better a condition than the intestate was, and could only stand in his place, and he was no other than a trustee for A., to whom he had given a deed of trust; and as to the subsequent assignment nothing passed by that, for he had no equitable interest then remaining in him, having before executed a deed of trust, and therefore differs from the case mentioned, where a cestui que trust, who had an equitable interest in him, makes a first and second assignment of that interest.

[* 575] *No. VII.

Barnardiston v. *Simpson.*

Melmoth, Vol. IV. p. 255.

The defendant Simpson having used his wife with great cruelty and turned her out of doors, she libelled against him in the Spiritual Court for a divorce for cruelty and adultery; upon which he, being sensible of his fault, employs a friend to mediate a reconciliation, and several meetings were had for that purpose between him and some friends of the wife, who insisted that a settlement should be made upon her, which he agreed to, and accordingly transferred £1200 South Sea Annuities to trustees upon trust to permit the wife to receive the dividends during her life for her separate use; which trust was declared by a deed in writing.

Upon these terms the wife surceases her suit in the Spiritual Court, and agrees to cohabit again with her husband, which she accordingly does, and during such cohabitation the defendant borrows money of the plaintiff and confesses a judgment for securing it, and the wife had solicited the plaintiff to lend her husband the money, and to induce the plaintiff so to do told him her husband had an estate in Jamaica, but took no notice of the settlement of the annuities.

After this the defendant falls out again with his wife, uses her ill, and turns her out of doors the second time, upon which she brings a new suit for a separation and obtains a sentence accordingly.

(*b*) Sir J. Jekyll.

The plaintiff's bill was to charge the annuities with his judgment and to have a satisfaction thereout of his debt.

The consideration mentioned in the deed of trust was only that of a marriage had and of love and affection of the defendant towards his wife, and though it was not mentioned to be for divers other good causes, &c., yet the defendant, the wife, was allowed to read proofs to show the annuities were transferred upon another consideration besides what was mentioned in the deed; which being fully proved, the Master of the Rolls (*c*) (though it was insisted for the plaintiff that if the wife had proceeded in her suit she could only have obtained a sentence for separation and alimony, which alimony would have ceased upon the cohabiting together again, and the settlement came only in the room of alimony) was clear of opinion that the settlement was made upon a good consideration, and not fraudulent as against the plaintiff, and therefore dismissed the bill with costs.

No. VIII. [576]

Stanfield v. *Miller.*

Coxe MSS., M. 336.

The bill in this case was by the plaintiff, as administrator to his brother, to have a discovery and account of several bonds and notes which belonged to the intestate.

The defendant insisted that he was entitled to them, for that the intestate before his death gave them to him, with his own hands, as a free gift, he being then and having been long before a servant to the intestate. But the Court decreed the bonds and notes to be delivered up to the plaintiff, for that the same being choses in action and not assignable in law, nothing vested in the defendant by such gift to take away that right which is in the plaintiff as administrator and representative of his brother, and this though there was no creditor in the case, for there was no consideration for the gift to support an equitable interest.

No. IX.

Cracherode v. *Hallam.*

Melmoth MSS., Vol. V. p. 112.

One Meadows upon his marriage settled lands to the use of himself for life, then to his wife for life, remainder to the heirs of her body by him begotten, remainder to him in fee.

(*c*) Sir J. Jekyll.

Some time after the marriage Meadows and his wife having several children, they agreed to make a new settlement, and accordingly a fine was levied, and by deed they declared the uses to Meadows for life, then to his wife for life, remainder to trustees and their heirs upon trust to sell, and to divide the money arising by the sale equally amongst all the children.

Afterwards Meadows mortgages to the plaintiff, who had notice of the second settlement, and after the death of Meadows and his wife the trustees sell the estate to defendant, who had no notice of the plaintiff's mortgage.

The plaintiff's bill was that the defendant might redeem his mortgage or be foreclosed.

The question was if the second settlement was voluntary or not, being made after marriage; for if it was voluntary it was fraudulent and void as against the plaintiff, though he had notice, he being a purchaser for a valuable consideration.

[* 577] *The Master of the Rolls (*d*) was clearly of opinion that the second settlement was not voluntary; but made upon a good consideration.

The wife was tenant in tail by the first settlement, and that estate tail could not be barred without her consent and by her joining with her husband; and she contracts with him to levy a fine, and bar her estate tail in consideration of his agreeing, instead of letting the estate go to the eldest son, that after their death it should go amongst all the children equally; and her parting with her estate tail was a good consideration for making the second settlement. And he said that though he did not know that this case had ever been determined; yet there were several case parallel to it: and particularly mentioned the cases where a woman after marriage agrees to levy a fine to bar her dower, and in consideration thereof her husband makes a settlement upon her: this will not be voluntary. And he said there was no doubt but a man and his wife might contract together, and she may contract and be bound by the medium of a fine. And he thought this a very clear case, and dismissed the plaintiff's bill.

No. X.

Higden v. *Watkinson.* (*e*)

(*e*) S. C. sub. nom. *Higden* v. *Williamson*, 3 P. Wms. 132.

Melmoth MSS., Vol. V. p. 300, and see *ib.* 196, 226.

A sum of money is devised to a woman for life, and after her death to such of her children as should be living at her death. The defendant, who was one of the children, becomes a bankrupt in the lifetime of his mother, and the commissioners assign his contingent interest in this money to the plaintiffs.

(*d*) Sir J. Jekyll.

The bankrupt obtains his certificate and then the mother dies. The question was whether this contingent interest was assignable, and whether the bankrupt's share of the money belonged to him or to the creditors.

The Master of the Rolls decreed it to the plaintiffs, the assignees, and the bankrupt appealed from this decree.

And now it was insisted for the assignees that this contingent interest was assignable by the Statute of Elizabeth which says that the commissioners may assign all things that the bankrupt may lawfully depart with. Every right, interest, or possibility which a bankrupt may lawfully depart with is vested in the assignees. (Goodwin, "Of Bankrupts," 83-4.) Conditions of re-entry have been held to vest in the assignees.

It is no objection to say the defendant during the life of his mother had only a mere possibility, for a possibility may be devised (Poll. 44), and though it is not assignable at law, yet it may be assigned in equity, *and so it was [* 578] determined by Lord Cowper in the case of *Tibbald* v. *Dufay* (*f*), which was a devise of a term to one for life remainder to A. and B. during the remainder of the term. A. marries, and she and her husband in the life of tenant for life assigns her moiety; and though she had only a possibility, for the tenant for life might have outlived the term, yet the assignment was decreed good against the wife, and the decree was afterwards affirmed in the House of Lords.

In the present case the defendant might have released his interest in the money to the trustees in the life of his mother; and therefore, though he had but a possibility, yet it was such an interest as he might lawfully depart with, and consequently is within the words and meaning of the Statute of Queen Elizabeth, and therefore it was prayed that the decree might be affirmed.

For the defendant it was said that in the case of a devise of a remainder of a term after an estate for life, although it is but a possibility (for in the eye of the law an estate for life is looked upon as larger than an estate for 1000 years), yet the remainderman has an interest vested in him. It is certain he is the person entitled to take if he survives the tenant for life during the term. Equity considers this as a vested interest. But in our case the portion is uncertain. The bankrupt at the time of the commissioners' assignment might not have been the person that was to take. He might not have been *in esse* at the death of his mother. If he could have released (which is not clear), yet that is not such a departing as is within the Statute; but he ought to have such an interest as he might transfer or assign. As to a condition mentioned on the other side to be assignable, that is a vested interest; a condition will descend and go to the heir.

Upon the whole it was said there was no case where a thing so contingent that it was wholly uncertain when the person would ever be entitled, could be assigned, even in equity.

Lord Chancellor (*g*), after a few days' consideration, affirmed the decree. He said the certificate did not entitle him to any interest which he had before. This was an interest although it was contingent; and he laid a great stress upon the words in the Statute, *lawfully depart with.*

(*f*) *Theobalds* v. *Duffoy*, 9 Mod. 102.

(*g*) Lord King.

[* 579]

*No. XI.

Witherden v. *Jumper.*

Melmoth MSS., Vol. V. p. 252.

Defendant after his marriage covenanted that £1500 South Sea Annuities should be sold and laid out in lands, to be settled upon his wife and younger children; afterwards he contracts debts, and assigns over the annuities for satisfaction of debts in a schedule.

Plaintiffs being some of the scheduled creditors, bring their bill to have the annuities sold and the debts paid; and it was so decreed; the Master of the Rolls (*h*) without any difficulty declaring the settlement, being after marriage, was fraudulent against the creditors, and that is was not material whether the debts were contracted before or after the settlement.

(*h*) Sir J. Jekyll.

No. XII.

Anon.

Coxe MSS., N. 108.

A *feme sole* before her marriage deposited her money in her brother's hands, and by articles between them in writing declared that the same should be placed out at interest in the name of the brother, and the interest be paid to her for her life, and then to her issue, and for want of such issue to her brother. After this the *feme* married, and with her husband brought a bill to have the money paid to the husband and, the *articles being voluntary*, decreed accordingly.

No. XIII.

Rock v. *Dade.*

Melmoth MSS., Vol. I. p. 108.

A woman, being seised in fee of lands, marries a second husband, and before her marriage conveys this estate to him and his heirs, and he covenants to charge it with £1000 for the children of the wife by her first husband; accordingly, after the marriage he settles this estate and charges it with £1000, pur-

suant to his marriage agreement, and *then entails it upon his own [* 580] children; after this he borrows money upon bond and dies, and the question was, if this settlement was fraudulent against a bond creditor.

Sir Simon Harcourt for the defendant:—In this case the husband was not indebted at the time of the settlement, and I never knew it said that when a man makes a settlement as a provision for his family and is in good circumstances at that time, that this was fraudulent; the circumstances of the party is a matter that the judges upon trials in such cases do always direct to be inquired into.

Mr. Vernon:—This is a matter purely at law and triable there; besides, they have not proper parties before the Court, for they have only the widow who has an estate for life, and not the heir whose estate they would charge.

Lord Chancellor (*i*):—They have not proper parties here, and therefore no decree can be made; but this much I may say, that it is a case very proper for this Court, for it is certain that the settlement is good as to the £1000, and therefore it is very proper for the plaintiff to come here to redeem that mortgage, in case the settlement does not stand in their way; and truly I cannot but declare so much of my opinion as to say that when a man makes a voluntary settlement to provide for his family and keeps in possession of this estate, and upon the credit of that contracts debts, it will be hard, I think, to make this a good settlement against creditor, and to say that an inquiry shall be made what the circumstances of the man were at the time of the settlement is a great fineness, and cannot be supported on solid reason; for may not a man make a settlement to secure his estate against future creditors as well as present?

But now in the case before us there are two powers of revocation which makes it still the stronger. 1. A power for the man and his wife jointly during the coverture to revoke, so that he has in effect the power in himself, for the wife is *sub potestate viri*. 2. There is a power for him to revoke if he survives his wife, paying £1000 to his wife's children. But I give no opinion.

Serjeant Hooper for the plaintiffs:—We may have a decree to inquire into the personal estate, and if it appears the £1000 has been paid out of that, we may stand in the room of the mortgagee, and have a satisfaction out of the real estate; which was agreed, but afterwards they thought it more proper to pay the costs of the day and pay no decree, and so bring the heir before the Court.

(*i*) Lord Cowper.

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